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No. _____

In The
Supreme Court of the United States

KEITH A. ROBERTS,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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December 15, 2008

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QUESTIONS PRESENTED FOR REVIEW

A. Whether it is a denial of a veteran's due process rights to require him to answer a criminal indictment alleging the same misconduct which served as the basis for the denial of veterans' benefits, where the appeal of the decision of the Department of Veterans Affairs is still pending before the United States Court of Appeals for Veterans Claims.

B. Whether the Seventh Circuit Court of Appeals erred in concluding that the evidence presented at trial was sufficient to sustain a conviction for wire fraud, when the government had failed to establish, beyond a reasonable doubt, the necessary elements for such a charge.

C. Whether the Seventh Circuit Court of Appeals erred in finding that Mr. Roberts' right to due process was not violated by the government's withholding of material information.

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INTRODUCTORY PRAYER

The Petitioner respectfully requests that a writ of *certiorari* be granted to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on July 7, 2008.

OPINIONS BELOW

The judgment of the United States District Court, Eastern District of Wisconsin, was not reported, but is included in the appendix. (App. 26a-34a). The Court of Appeals for the Seventh Circuit decision (App. 1a-25a) is reported as *United States v. Roberts*, 534 F.3d 560 (7th Cir. 2008). The Court of Appeals decision denying the Petitioner's motion for rehearing is unreported, but is included in the appendix. (App. 35a-36a).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 7, 2008. A request for rehearing was denied by the Court of Appeals on September 16, 2008. This Petition is timely filed according to Supreme Court Rules 13.1 and 13.3. The Court derives jurisdiction from 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

U.S. Const. *Amend. V.*

> . . . the Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans . . . Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

38 U.S.C. § 511(a).

> The second sentence of subsection (a) does not apply to–
>
> (1) matters subject to section 502 of this title;
>
> (2) matters covered by sections 1975 and 1984 of this title;
>
> (3) matters arising under chapter 37 of this title; and
>
> (4) matters covered by chapter 72 of this title.

38 U.S.C. § 511(b)

> VA police and/or the OIG, whichever has primary responsibility within VA for investigation of the offense in question, will be responsible for notifying the appropriate United States Attorney's Office, pursuant to 28 U.S.C. 535.

38 C.F.R. § 1.205

Before a submission is made to the U.S. Attorney in cases involving personnel or claims, the General Counsel, if the file is in Central Office, or the Regional Counsel at the regional office, hospital or center, if the file is in the regional office or other field facility, will first ascertain that necessary administrative or adjudicatory (forfeiture (see Pub. L. 86-222; 73 Stat. 452), etc.), action has been taken; except that in urgent cases such as breaches of the peace, disorderly conduct, trespass, robbery, or where the evidence may be lost by delay, or prosecution barred by the statute of limitations, submission to the U.S. Attorney will be made immediately.

38 C.F.R. § 14.561

(b) Whoever obtains or receives any money or check under any of the laws administered by the Secretary without being entitled to it, and with intent to defraud the United States or any beneficiary of the United States, shall be fined in accordance with Title 18, or imprisoned not more than one year, or both.

38 U.S.C. § 6102 (b)

(a) Whoever knowingly makes or causes to be made or conspires, combines, aids, or assists in, agrees to, arranges for, or in any way procures the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, concerning any claim for benefits under any of the laws administered by the Secretary (except laws

pertaining to insurance benefits) shall forfeit all rights, claims, and benefits under all laws administered by the Secretary (except laws pertaining to insurance benefits).

38 U.S.C. § 6103

38 C.F.R. PART 42 -- STANDARDS IMPLEMENTING THE PROGRAM FRAUD CIVIL REMEDIES ACT

(a) Basis. This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. 99-509, 6101-6104, 100 Stat. 1874 (October 21, 1986), to be codified at 31 U.S.C. 3801-3812. Section 3809 of title 31 U.S.C., requires each authority head, such as the Secretary of Veterans Affairs, to promulgate regulations necessary to implement the provisions of the statute.

(b) Purpose. This part:

(1) Establishes and provides the only administrative procedures and actions for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents, and

2) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

38 C.F.R. § 42.1

38 C.F.R. §§ 42.2-42.47

STATEMENT OF THE CASE

On November 10, 2004, the Petitioner had his service related disability compensation benefits for Post Traumatic Stress Disorder (PTSD), terminated by the U.S. Department of Veterans Affairs for fraud in the claims process.

On April 26, 2005, the Grand Jury for the Eastern District of Wisconsin returned an indictment against the Petitioner. On September 13, 2005, a superceding indictment was filed, charging the Petitioner with five counts of wire fraud, in violation of 18 U.S.C. § 1343. The superceding indictment included the following factual allegations:

On February 4, 1969, while serving in the United States Navy, the Petitioner was stationed at Naples, Italy. While performing aircraft maintenance, an airman became pinned when the landing gear collapsed. Attempts to save his life were unsuccessful. (App. 267a-268a).

It was alleged that, from 1994 to 2004, the Petitioner devised and participated in a scheme to defraud the United States Department of Veteran Affairs (VA) of compensation benefits, through the use of interstate wire communications. Allegedly, the Petitioner provided materially false and fraudulent written and oral information to the VA, claiming to suffer from post-traumatic stress disorder (PTSD) based upon his role in the accident. The superceding indictment further alleged that the VA paid the Petitioner via electronic funds transfers (EFT)

conducted through interstate wire communications. The indictment alleged that the Petitioner obtained over $320,000 from the VA.

On September 26, 2005, the Petitioner filed a motion to dismiss the indictment, asserting that the United States Court of Appeals for Veteran's Claims (CAVC) had exclusive jurisdiction over veterans' claims and since his appeal was pending before that Court, (docket number 05-2425) the government had acted prematurely in prosecuting him for actions which were still the subject of administrative proceedings. The district court denied the motion on October 5, 2005.

On November 4, 2005, the Petitioner filed two motions to dismiss. The first, based upon double jeopardy, alleged that VA officials had fraudulently convinced the government that the VA proceedings were final, when in fact he still had the opportunity to appeal the VA's decision.

The second motion asserted that the government's contention that the Petitioner's compensation benefits were granted "solely upon" the Petitioner's allegedly fraudulent statements was clearly erroneous and unsubstantiated by the government's "complete record". Both motions were dismissed on May 30, 2006.

On January 13, 2006, the Petitioner filed a motion for production of favorable information. The Petitioner also filed a motion for a bill of particulars, seeking, for one, the disclosure of any documentary evidence the government intended to introduce at trial. On May 9, 2006, the Petitioner filed another motion to dismiss, alleging that the charges were premature and intruded

upon the authority of another branch of the government.

The jury trial began on November 6, 2006. At the conclusion of the government's case, the Petitioner moved for a judgment of acquittal, asserting that the evidence was insufficient to establish that the Petitioner purposefully made any material misrepresentations, that the statements were false, or that he knew the statements were false. On November 8, 2006, the jury returned a verdict of guilty on all counts.

Following the verdict, a presentence investigation report (PSI) was prepared. The PSI determined that the total loss attributable to the Petitioner was $569,426.90. This amount included the payments that were made to the Petitioner, as well as what he would have received, if the requested retroactive amounts had been paid. The court stated that the Guidelines do not distinguish between actual and intended loss, and concluded that it had no problem including in that calculation the amount of actual loss ($262,943.52) and the intended loss ($288,391.26). The court adopted the PSI's calculation, and concluded that the guideline sentence range was 46 to 57 months imprisonment.

The Petitioner was sentenced to 48 months imprisonment and $262,943.52 in restitution. Judgment was entered on March 6, 2007. (App. 28a, 33a). A notice of appeal was filed on March 9, 2007. The Petitioner raised the following issues to the Seventh Circuit:

1. The district court erred in denying the Petitioner's motions to dismiss, as the

court's exercise of jurisdiction constituted a denial of the Petitioner's right to due process, due to the pending appeal before the United States Court of Appeals for Veterans Claims.

2. The evidence presented at trial was insufficient to sustain a conviction for wire fraud.

3. The Petitioner's right to due process was violated when the government withheld material information.

4. The district court erred in applying an enhancement to the Petitioner's sentence, as such was not submitted for proof beyond a reasonable doubt.

On July 7, 2008, the Seventh Circuit affirmed the Petitioner's conviction and sentence. *United States v. Roberts*, 534 F.3d 560 (7th Cir. 2008). (App. 1a-25a). The Petitioner subsequently filed a petition for rehearing, which was denied on September 16, 2008. (App. 35a-36a).

Oral argument was held in the United States Court of Appeals for Veteran's Claims on October 23, 2008. No decision has been issued.

STATEMENT OF FACTS

During the Petitioner's service in Naples, Italy, on February 4, 1969, there was an airplane accident. Gary Holland became trapped in the front main

landing gear of a C-54 aircraft. (App. 267a-268a). Holland was freed, but died the following day.

Jerry Fuchs conducted the official investigation of the accident and a report was prepared, including statements from twenty people. At least 30 others were present at the scene. The record indicates that approximately 84 military personnel worked in the hangar where the accident occurred, to include the Petitioner. There were also civilians assigned to the work area. The investigation's purpose was determining how the accident happened. The investigation concluded that the accident was caused by the use of the wrong type of locking pin in the landing gear. The Petitioner has asserted that the removal of the aircraft jack stands from underneath the aircraft was the actual cause of the accident.

In February, 1987, the Petitioner filed a claim for disability benefits with the VA. The claim was denied. In October, 1990, the Petitioner renewed his claim for pension benefits, and added compensation benefits claims for a military service related knee condition and hearing loss. These claims were denied. On March 19, 1993, the Petitioner was granted pension benefits retroactive to November 14, 1990. On August 4, 1993, the Petitioner filed a claim for acute personality disorder, which he alleged began on December 13, 1969. That claim was denied.

On March 1, 1994, the Petitioner filed an amended claim for post-traumatic stress disorder (PTSD). The claim was denied for lack of supporting evidence of a stressful event and documentation of a PTSD diagnosis.

On December 27, 1994 the Petitioner filed another claim, including a statement of facts:

1) In Naples, he was in charge of the line shack, which was responsible for plane directing and rescue missions.

2) His friend Holland was crushed when a safety pin was released, causing a plane to fall.

3) He sounded the alarm, informed a chief petty officer of the situation, and ordered him to have the plane lifted with the forklift.

4) After men were placed into the tail section of the plane, he instructed someone to puncture the radome of the plane with the forklift and lift the plane, but a safety officer had him restrained.

5) Airbags were used to lift the plane, taking approximately 10-12 minutes. The safety officer said it was more important to save the plane than to save the man.

6) After the plane was lifted, he broke away, helped free Holland, and brought him to someone who gave Holland a shot to revive him. Holland died the next day at the hospital.

The Petitioner wrote that he believed Holland would have lived had his efforts not been thwarted. He had been suffering from nightmares, had problems dealing with stress and authority figures. The claim was denied for lack of a diagnosis.

On October 24, 1997, the Petitioner provided the VA with a copy of Holland's death certificate, and a PTSD diagnosis. The VA obtained evidence corroborating the Petitioner's story, including evidence that Holland had been crushed in an airplane accident on February 4, 1969, that it took 10-12 minutes to free him, and that he died the next day.

The Petitioner was awarded PTSD compensation on May 19, 1998, with an effective date of August, 1993. The effective date was later modified to July, 1992.

A VA psychologist Dr. Michael Marcy, had evaluated the Petitioner.

Marcy testified that the Petitioner told him that the death of a friend during his Navy service resulted in a distrust of authority. He told Marcy that Navy leaders did not adequately respond to the accident, that he was impeded from helping, and that the investigation was poor. He told Marcy that he thinks about these things at least three to four times per week, and has nightmares. Marcy concluded that because of the death of Holland the Petitioner had become emotionally and socially isolated, suffered from intrusive recollections, drank alcohol to forget, distrusted authority, had problems concentrating and had suicidal ideations.

Marcy determined that the Petitioner's ability to work had been greatly diminished. His concentration was affected by PTSD. His reliability and productivity were diminished, and the PTSD caused depression and anger control difficulties. Marcy's diagnosis was

PTSD. Marcy testified that being a bystander when Holland was crushed would be a PTSD stressor.

In December 2003, the Petitioner contacted Ray Vasil, Special Agent with the VA Inspector General in Chicago. He told Vasil that VA employees in Milwaukee, Wisconsin, were tampering with his records.

Vasil met with Mr. Jon Baker, the director at Milwaukee. Vasil then began to investigate the Petitioner for fraud. Mr. Vasil obtained the 1969 Navy report. He traveled to Florida to interview Mr. Fuchs. He met twice with the Petitioner. Mr. Vasil was the only witness before the Grand Jury.

The Inspector General concluded that the Petitioner was not present during Holland's accident. (The record confirms that Holland and the Petitioner attended Navy courses in Tennessee and New Jersey, then went to Naples. They lived in the enlisted barracks across the hall from each other. They worked in the same building for several months prior to the death of Holland, and they both took the E-4 promotion test on the morning of the 4th.) At trial a VA representative, Barbara Nehls, testified that the Petitioner received $262,944.12 more than he should have, based upon the determination that he was not entitled to VA disability compensation benefits for PTSD.

Portions of the Petitioner's statement of facts provided to the VA were supported by the testimony at trial and Vasil's report. Testimony established that the Petitioner was stationed at the base at the time of Holland's accident. Testimony confirmed that an

alarm was sounded, and that Holland was crushed by the airplane.

Richard McFadden testified that he suggested using a forklift to lift the plane, and the idea was rejected. Jack Tankersley operated the forklift, and was going to puncture the radome to lift the plane, but was stopped. People were placed in the rear of the airplane.

Others testified that it took 10-12 minutes to raise the airplane and that Holland was administered a shot before being transported to the hospital. Others testified that they did not remember seeing anyone from the line shack leading the rescue operation. They also said that such personnel would not normally be responsible for rescue operations, which is untrue.

Others stated that the airplane was lifted with a forklift fitted with slings, and that the airbag-method was considered, but rejected.

Some testified that the airplane was lifted quickly, but confirmed that there was talk around the base that the airplane should have been raised sooner.

A comparison of the reports of Fuchs and Vasil confirms that everyone who took part in the rescue was not interviewed. In 1969 the interviewees were not asked if the Petitioner was present. No list of witnesses was compiled.

The following facts asserted by the Petitioner were corroborated by Vasil's report: (1) Holland's name; (2) the make of the airplane; (3) how Holland died; (4) the

time of day the accident occurred; and (5) that a shot was administered to Holland.

Dr. Donald Derozier testified that he evaluated the Petitioner on March 26, 2003 and diagnosed the Petitioner as having PTSD. Derozier had considered whether the Petitioner was lying regarding his involvement in the incident, in order to obtain VA benefits, but determined that he was not lying.

On October 15, 2004, the American Legion wrote to the VA and requested the 38 C.F.R. part 42 procedures and the Vasil report (App. 142a-149a).

The VA severed the disability benefits of the Petitioner for fraud on November 10, 2004. (App. 115a-123a).

On November 22, 2004, the petitioner wrote to the Secretary of Veterans Affairs, complaining that his rights under the Fifth Amendment to the U.S. Constitution had been violated. (App. 150a-159a).

The Petitioner appealed the VA decision. On April 26, 2005, a Grand Jury issued a six count indictment of Petitioner for mail fraud under Title 18 U.S.C. § 1341 based upon six letters that he wrote to the VA seeking an earlier date for his benefits.

In June of 2005 petitioner required leave of the District Court to attend a hearing at the Board of Veterans Appeals in Washington, D.C.. The Board would not permit the Petitioner to review the Vasil report. The Board issued a decision on August 26, 2005. (App. 54a-114a).

On August 26, 2005, the Petitioner filed a Notice of Appeal with the U.S. Court of Appeals for Veterans Claims, (CAVC) docket number 05-2425. Oral argument was held on October 23, 2008. No decision has been issued. The Petitioner was convicted in November of 2006 and sentenced on March 2, 2007. (App. 264a-266a).

REASONS FOR GRANTING THE WRIT

Under Supreme Court Rule 10, the Court will review a United States Court of Appeals decision for compelling reasons. A compelling reason exists when

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> ***
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

S.Ct.R. 10(a). These compelling reasons exist in this case. The Court of Appeals determined that it was proper for a criminal prosecution to go forth when such action was based on allegations of the same misconduct which served as the basis for the denial of veterans' benefits, while the appeal of the decision of the VA was pending before the U.S. Court of Appeals for Veterans Claims. This specific question is a matter of first impression and should be addressed by this Court. The decision of the Seventh Circuit, in deciding this issue, conflicts with decisions of this Court on related matters. The Court of Appeals decision reflects a departure from the accepted and usual course of judicial proceedings, thereby calling for the exercise of this Court's supervisory power.

A. The Seventh Circuit Court of Appeals Erred in Failing to Find that it is a Denial of a Veteran's Due Process Rights to Require Him to Answer a Criminal Indictment Alleging the Same Misconduct Giving Rise to the Denial of Veterans' Benefits, Where the Appeal of the Decision of the Department of Veterans Affairs is Still Pending Before the United States Court of Appeals for Veterans Claims.

In evaluating due process claims, an inquiry must be made as to whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). As stated by Justice Frankfurter, due process:

> embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just.

Solesbee v. Balkcom, 339 U.S. 9, 16, 70 S. Ct. 457, 461, 94 L. Ed. 604 (1950).

The Petitioner asserts that his due process rights were violated when he was prosecuted on the basis of a determination of issues which were already pending determination by the U.S. Department of Veterans Affairs at the Board of Veterans' Appeals, (BVA), and later at the United States Court of Appeals for Veterans Claims (CAVC). The Petitioner was indicted on April 26, 2005. A hearing before the BVA in the benefits appeal was held in Washington, D.C. in June of 2005. The decision of the BVA affirming the reduction of his disability benefits is dated August 26, 2005. (App. 54a-114a). An appeal was filed with the CAVC on August 26, 2005, docket number 05-2425. (App. 52a-53a). Following briefing (App. 160a-207a) and supplemental briefing (App. 208a-238a; 239a-263a) to that court, oral argument was held on October 23, 2008, pursuant to an order dated August 12, 2008. (App. 39a-40a). The issue at bar in that case is the Petitioner's entitlement to the restoration of disability benefits payments from the VA. No decision has issued.

The CAVC has exclusive jurisdiction to to conduct the initial judicial review of decisions regarding VA benefit claims. *Scarborough v. Principi*, 541 U.S. 401,

413, n.3 (2004); *See also Brown v. Gardner*, 513 U.S. 114 (1995). In this case a criminal prosecution was commenced and concluded during the pendency of the VA appeal process. The Petitioner is incarcerated, having been convicted of five counts of wire fraud, (App. 26a-34a), while the CAVC may soon determine that he was legally entitled to these payments. This premature prosecution deprived the Petitioner of his due process rights. It trampled the jurisdiction of the CAVC, the Court empowered by Congress to review VA benefits appeals.

Should the Petitioner not prevail at the CAVC, he still has his appeal of right to the U.S. Court of Appeals for the Federal Circuit. The Secretary of Veterans Affairs and the Department of Justice have circumvented the exclusive jurisdiction of the CAVC. The matter was not ripe for criminal prosecution.

In *Winslow v. Walters*, 815 F.2d 1114, 1117 (7th Cir. 1987), the appellate court stated that 38 U.S.C. § 211 deprived federal courts "of the power to alter determinations made by the VA regarding disability ratings and entitlements to benefits." Since that case was decided, § 211 has been repealed. In its place, 38 U.S.C. § 511 states that "the Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans . . ." 38 U.S.C. § 511(a). The statute further provides that "the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court . . ." *Id.* The exceptions to this rule are limited to issues of notice regarding rulemaking, under § 502, matters related to insurance under §§ 1975 and 1984, matters arising

under § 3701, *et seq.*, regarding housing and small business loans, and matters covered by 38 U.S.C. § 7251, *et seq.*, which involves the jurisdiction, organization, and procedure for the CAVC. 38 U.S.C. § 511(b). Any question of law or fact utilized in the determination of the Petitioner's right to VA benefits was not reviewable by any court other than the CAVC.

1. The Court of Appeals Erred by Failing to Address the Issue at Bar

The Court of Appeals agreed that both the criminal case and the benefits appeal "involve the question of whether Mr. Roberts made false statements in his veterans' benefits claims . . ." *United States v. Roberts*, 534 F.3d 560, 568 (7th Cir. 2008); (App. 13a-14a). However, the Court of Appeals erred in concluding that "the district court did not 'review' the decision of the Board of Veterans' Appeals regarding [the Petitioner's] disability rating or entitlement to benefits . . ." *Id.* This of course is not the issue which the Petitioner has presented. The issue is *not* whether the district court reviewed the decision of the Board of Veterans' Appeals, but rather, that the district court improperly adopted a non final determination as the underpinning of the criminal prosecution.

The Petitioner was originally awarded benefits based on the VA's reliance on the government documents which he provided, along with a diagnosis of PTSD. The Petitioner's benefits were reduced, based on, *inter alia*, a determination by the VA that his statements regarding in service stress were not true. (App. 129a-141a). The VA reduced the Petitioner's benefits based on the determination that he had made false statements, when his statements

cannot form the basis of an award of PTSD under controlling VA regulations and law. The criminal case also involved the question of whether the same statements were false. The CAVC was reviewing the issue of whether the VA complied with the relevant laws and precedents of that Court in determining that the Petitioner was not entitled to disability benefits and payments. The Petitioner was simultaneously facing criminal charges in the district court on the exact same review, the same historical event, and the same factual dispute - even though the CAVC had exclusive jurisdiction to review the VA's decision.

The Court of Appeals erred in failing to even address the true issue presented by the Petitioner: that the criminal prosecution of the Petitioner constituted an improper review of the VA's factual determinations, when the CAVC had the sole jurisdiction to conduct such review.

2. The Court of Appeals Erred by Relying on 38 C.F.R. §§ 1.200-05 to conclude that the district court properly denied the Petitioner's motion to dismiss for lack of jurisdiction.

The Court of Appeals erred in adopting the erroneous argument presented by the government, and relying on 38 C.F.R. §§ 1.200-1.205 to conclude that the criminal prosecution in the instant case did not violate the Petitioner's rights, since 38 C.F.R. §§ 1.200-1.205 requires VA employees to report information concerning criminal violations to law enforcement authorities for criminal investigation. *Roberts,* 534 F.3d at 568; (App. 14a).

38 C.F.R. §§ 1.200-1.205 outline the duties of VA employees to include reporting any criminal violations to law enforcement and states that the "VA police and/or the OIG, . . ., will be responsible for notifying the appropriate United States Attorney's Office . . ." 38 C.F.R. § 1.205. However, there are specific regulations for instances where fraud is alleged. These regulations, established under 31 U.S.C. §§ 3801-3812 and 38 C.F.R. §§ 42.1-42.47, afford certain due process protections, which were not provided to the Petitioner. If a determination of fraud is made under that procedure then the criminal penalty called for under 38 U.S.C. § 6102 (b) applies (fine and imprisonment of not more than one year). The calculation of any benefits overpayment requiring restitution must be determined by the Secretary of Veterans Affairs. The government pursued a premature criminal prosecution and wrongfully deprived the Petitioner of his due process rights and his liberty.

The Petitioner's benefits were reduced administratively, based upon a determination that his statement of facts forming the basis of his claim was not true. (App. 129a-141a). The VA had not completed the mandatory internal Agency review required in benefits cases. See 38 C.F.R. § 14.561:

> Before a submission is made to the U.S. Attorney in cases involving personnel or claims, the General Counsel, if the file is in Central Office, or the Regional Counsel at the regional office, hospital or center, if the file is in the regional office or other field facility, will first ascertain that necessary administrative or adjudicatory (forfeiture (see Pub. L. 86-222; 73

> Stat. 452), etc.), action has been taken; except that in urgent cases such as breaches of the peace, disorderly conduct, trespass, robbery, or where the evidence may be lost by delay, or prosecution barred by the statute of limitations, submission to the U.S. Attorney will be made immediately.

38 C.F.R. § 14.561.

The Petitioner pursued an appeal before the CAVC, his only avenue of review of the VA determination under the laws of the United States. The government has deprived him of both his liberty and the potential benefit of that appeal by pursuing a premature prosecution in the U.S. District Court. The Petitioner concedes that VA officials are sometimes required to submit cases to the U.S. Attorney's office prior to the exhaustion of such appellate procedures. Such is provided for in 38 C.F.R. § 14.561, ". . . in ***urgent cases*** such as breaches of the peace, disorderly conduct, trespass, robbery, or where the evidence may be lost . . ." (Emphasis added). This provision was not applicable here. There was no exigency. The VA benefits in question had already been stopped, and there was therefore no risk of further harm or loss to the government during the time necessary to complete the appropriate administrative procedures.[1]

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[1] The Court of Appeals inexplicably refused to consider any citation to 38 C.F.R. § 14.561. The Petitioner cited to same in response to the government's argument regarding the applicability of 38 C.F.R. §§ 1.200-1.205. The Court of Appeals stated that "arguments raised for the first time in a reply brief are waived." *Roberts*, 534 F.3d at 568, n. 5; (App. 14a). Of course, the Petitioner had not presented any such new argument. Rather, the

3. The Court of Appeals Erred in Failing to find Additional Due Process Violations.

The Petitioner was denied the due process protections afforded him by the administrative procedures in place, which must be followed where fraud is alleged. These protections are established in 38 U.S.C. § 6103, and 38 C.F.R. §§ 42.1-42.47. The *ad hoc* manner used by the VA to investigate and initiate criminal proceedings against the Petitioner for wire fraud resulted in a total disregard for his right to due process. The Petitioner was never furnished a target letter. He was not permitted to review the Vasil report at any time until after his indictment. It was not made available to him during the BVA hearing. The American Legion wrote to both the Inspector General and the Director, Compensation and Pension Service, of the U.S. Department of Veterans Affairs. (App. 142a-149a). He requested a copy of the investigative report and the notice and opportunity to have a hearing on the record before an Administrative Law Judge as provided under 38 C.F.R. §§ 42.1-42.47. Veterans Law Judges at the Board of Veterans' Appeals are employees of the agency, and their have been long standing complaints as to bias and lack of objectivity in the decisions promulgated by the Board. The Petitioner was never informed of his rights as a suspect until he was arraigned in U.S. District Court

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Petitioner's argument remained that the CAVC had exclusive jurisdiction, and by bringing the criminal prosecution, the government deprived him of the benefit of an appeal to that court. It was only after the government erroneously argued for the application of 38 C.F.R. §§ 1.200-1.205, that any citation to § 14.561 was necessary.

contrary to *Miranda v. Arizona*, 384 U.S. 436 (1966). He was interviewed twice after he was the focus of the VA fraud investigation. The VA did not inform him of his rights as the subject of investigation for criminal activity. Instead of adhering to such administrative requirements, the government pursued a premature criminal prosecution. The Petitioner was ordered to report for a psychiatric examination and was interviewed twice by the VA investigators after he was under investigation for fraud without notice of his rights. He was called in for yet another VA psychiatric examination after his benefits had been terminated. He testified under oath at his BVA hearing after his indictment. He was not notified of his right to counsel, to adjourn the proceedings, or of any consequences his testimony might have in his criminal case.

VA benefits proceedings are intended to be *exparte* and claimant friendly. See *Hodge v. West,* 155 F.3d 1356 (Fed. Cir. 1998). They are similar to disability benefits claims adjudications conducted by the Commissioner of Social Security. See *Sims v. Apfel*, 530 U.S. 103 (2000).

Although the VA Inspector General has broad authority, he still must follow the administrative procedures in place for individuals such as the Petitioner. In this case, the Inspector General chose to ignore those procedures. The actions in pursuing the criminal prosecution of the Petitioner was certainly *ultra vires*. Not only was there never a probable cause determination made by the VA General Counsel, the basis for the investigation of the Petitioner by the VA Inspector General was that "certain inconsistencies" were found in his VA administrative file. That file was over 2,500 pages in length at the time the

investigation was initiated. Had the Petitioner been afforded the notice, discovery and hearing called for in 38 C.F.R. §§ 42.1-42.47 he is confident that he would not have been indicted. The government's intentional circumvention of the relevant administrative processes is in direct violation of the principles established by this Court, which has long recognized that administrative regulations are to be followed. *Service v. Dulles*, 354 U.S. 363, 372 (1957); *Accardi v. Shaugnessy*, 347 U.S. 260, 267 (1954).

4. Conclusion

In the instant case, the Petitioner's compensation benefits were revoked because the Inspector General's report improperly concluded that the Petitioner misrepresented facts in his claim for PTSD benefits and that such misrepresentations were relevant to an award of compensation for service related PTSD. That is not true. Benefits for non-combat PTSD require independent corroboration. In reducing the benefits, the witnesses for the government claimed that the VA determined that the statement of facts offered by the Petitioner was not true.[2] The veracity of the Petitioner's statements are not relevant to the VA

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[2] This testimony improperly indicates that VA procedures for a PTSD benefits determination rely upon the factual assertions of the claimant. Under 38 CFR 3.304(f), medical evidence diagnosing the condition is required and, unless the claimant was engaged in combat or was a prisoner of war, the stressor must be proven by more than uncorroborated assertions by the claimant. See *Pentecost v. Principi*, 16 Vet. App. 124, 126-129 (CAVC 2002), *Cohen v. Brown*, 10 Vet. App. 128, 138 (CAVC 1987); *Suozzi v. Brown*, 10 Vet. App. 307, 309 (CAVC 1997).

PTSD benefits award, they cannot form the basis of such a determination.

It is probable that the CAVC will reverse the VA's decision and restore the Petitioner's benefits.

The Secretary has informed the CAVC of the conviction of the Petitioner and now argues that he is prevented from pursuing his appeal at the CAVC due to estoppel. Should the CAVC order his benefits restored, he cannot receive them as he is a convicted and incarcerated felon.

The U.S. District Court and the U.S. Court of Appeals for the Seventh Circuit have invaded the jurisdictional domain of the CAVC in direct contravention of the express intent of Congress. The determination by the court below that the criminal prosecution was within their jurisdiction is contrary to law. Until a final determination is made by the CAVC regarding the underlying entitlement to benefits the matter is not ripe for criminal prosecution.

By circumventing the statutory remedies in place for mentally ill veterans such as the Petitioner, the Department of Justice and the trial court have usurped the jurisdiction of the CAVC and have deprived the Petitioner of his right to due process and to a claimant friendly, *ex parte* adjudication of his benefits claims. This case presents an unprecedented situation in which the Petitioner was forced to defend himself in two entirely separate forums simultaneously after his financial resources have been eliminated. The criminal Court's decision in this matter is one which will have a far-reaching impact for the thousands of veterans who are now returning from

combat service. The unprecedented number of criminal prosecutions being initiated by the Secretary of Veterans Affairs is not in keeping with past practices or the internal regulations and statutes which govern that agency. The Petitioner respectfully requests that this Court grant his petition for a writ of certiorari so that this matter may be fully briefed and thus provide future guidance for all those concerned.

B. The Court of Appeals erred in concluding that the evidence presented at trial was sufficient to sustain a conviction for wire fraud, when the government had failed to establish, beyond a reasonable doubt, the necessary elements for such a charge.

Federal constitutional law requires that a verdict be supported by legally sufficient evidence for each element of crimes alleged. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970). Since the founding of this country the idea that one cannot be convicted upon evidence that does not rise to a level beyond a reasonable doubt has become enmeshed in our jurisprudence.

Due process rights, such as the need to prove elements of a crime beyond a reasonable doubt, protect against errors in fact finding. In *Cage v. Louisiana*, 498 U.S. 39, 40 (1990), the Supreme Court stated that the "reasonable doubt standard 'plays a vital role in the American scheme of criminal procedure. Among other things, it is a prime instrument for reducing the risk of convictions resting on factual error.'"

Furthermore, as noted in *Winship*, 397 U.S. at 364 (1970), "a society that values the good name and

freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *Winship* itself makes clear that the requirement of proof beyond a reasonable doubt is grounded upon accuracy concerns:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.

Id. at 364.

> The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted. . . as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.

Id. at 361 (quoting C. McCormick, Evidence § 321, pp. 681-82 (1954)).

To find the Petitioner guilty, the jury was required to find that the Petitioner "knowingly devised or participated in a scheme to defraud . . .", "that the scheme involved the misrepresentation of a material matter," that the Petitioner made such a material misrepresentation with the intent to defraud, and that, for the purpose of carrying out the scheme, the

Petitioner caused interstate wire communications to occur.

1. **The Court of Appeals erred in failing to find that the evidence did not establish, beyond a reasonable doubt, that more than a minor portion of the Petitioner's account of the incident was misrepresented.**

The Court of Appeals stated that the Petitioner argued "that the Government failed to prove beyond a reasonable doubt that his statements to the VA regarding Airman Holland's death were false" (*Roberts*, 534 F.3d at 569) (App. 15a). The Petitioner actually argued, and continues to argue, that the evidence offered at trial did not establish, beyond a reasonable doubt, that *more than a minor portion* of the Petitioner's account of the incident to the VA was incorrect.

Much of the Petitioner's statement of facts to the VA were corroborated by the government's witnesses. The Petitioner claimed that Holland should not have died, had the accident been remedied properly. Although the Court of Appeals concluded that witnesses "testified that the rescue mission had been orderly and well managed . . ." (*Roberts*, 534 F.3d at 570); (App. 17a), there was further testimony that there had been talk around the base that the airplane should have been raised more quickly.

At best, the testimony at trial left the following statements unconfirmed: (1) that airbags were used to lift the plane; and (2) that the Petitioner first suggested running the forks of the forklift through the

radome in order to lift the plane. The Court of Appeals suggested there was sufficient evidence of other misrepresentations - such as whether the Petitioner was present at the scene, and whether the Petitioner was friends with Holland. *Roberts*, 534 F.3d at 570; (App. 17a). However, there certainly was not sufficient evidence to support these findings. Some witnesses did testify they did not remember seeing the Petitioner at the scene and that they did not know the Petitioner to have been friends with Holland. These witnesses admitted that they did not know the Petitioner. It is undisputed that the Petitioner was stationed at the base at the time in question and worked in the hangar. It would have been impossible for them to remember whether the Petitioner was present if they did not know him. Only Holland could have confirmed his relationship with the Petitioner.

On the other hand, the trial testimony corroborated the Petitioner's claims that

(1) he was stationed at the base;

(2) that Holland was crushed by a plane as a result of a pin releasing;

(3) that the accident occurred while the Petitioner was stationed in Naples;

(4) that an alarm was sounded;

(5) that men were placed in the rear of the plane;

(6) that the idea of puncturing the radome was initially rejected;

(7) that it took between 10 and 12 minutes to lift the plane; and

(8) that Holland was given a shot before being taken to the hospital where he died the next day.

Critical portions of the Petitioner's statement of facts were neither corroborated nor refuted by those who testified at trial, including the following assertions:

(1) that the Petitioner believed Holland would have lived had his attempts not been thwarted;

(2) that the Petitioner suffered nightmares and had problems dealing with stress and authority figures; and

(3) that the Petitioner felt the investigation into the accident was faulty.

There existed some differences between the statement of facts provided by the Petitioner and the trial testimony. That testimony included assertions that witnesses did not remember an airman giving orders, that they did not hear anyone say it was more important to save the plane than to save Holland. Essentially, some portions of the Petitioner's statement of facts was entirely consistent with, and even corroborated by, testimony offered at trial, while other portions were inconsistent. This should not be surprising. The government's witnesses were testifying to something which had occurred approximately 13 years before the Petitioner provided his statement of facts. The government relied upon

the investigative report which was prepared soon after the incident. The Petitioner was not interviewed for the investigation. It did not describe the rescue attempt in great detail. There is no list of participants.

After over thirty years, it should not be surprising that the witnesses at trial could not recall the presence of someone at the incident they never knew.

The Petitioner's statement of facts contains only a few inconsistencies. Therefore, to convict the Petitioner, the jury had to conclude that this minor portion of that statement of facts constituted a material misrepresentation, was intentionally misrepresented, and was made for the purpose of defrauding the VA.

2. The evidence did not establish, beyond a reasonable doubt, that the Petitioner *intentionally* misrepresented facts to the VA.

The Court of Appeals failed to make any findings relative to whether any alleged misrepresentations by the Petitioner were intentionally made. In fact, there was no evidence that the Petitioner intentionally misrepresented any facts. The government's only attempt to show that the Petitioner intentionally misrepresented facts was that he may have heard stories around the base and then just pieced the story together. The government's theory would require the jury to determine that people who were present at the scene had faulty memories of the incident, within months after its occurrence.

The Petitioner was relying upon his own memory. He did not have an opportunity to review the Navy report during the VA claims adjudication, as the VA IG and witnesses did before the trial. There was no evidence presented at trial which proved that any facts were intentionally misrepresented.

3. The evidence did not establish, beyond a reasonable doubt, that the alleged misrepresentations were material.

To find the Petitioner guilty, the jury was required to find, beyond a reasonable doubt, that he had made material misrepresentations. The misrepresentations which were allegedly made were not proven to be material. The government's witness testified that the VA requires a claimant such as the Petitioner to establish an in service stressor and a diagnosis of PTSD. In turn, the stressor must be credibly supported by the VA's own findings. The government's own witness then testified that, in order to issue benefits for a claim such as the Petitioner's, every fact of the claimant's story need not be verified - just enough so that "it would feel that his statement was true." Given this testimony, the jury was told by a VA representative that no misrepresentation would be material, so long as the VA could verify that the claimed incident (Holland's death) occurred and that the claimant was stationed at that location at that time (which was verified by the VA). The Petitioner has two stressors, one is a psychiatric hospitalization documented in the Navy medical records. He only needs one.

The government failed to prove, beyond a reasonable doubt, that the alleged misrepresentations were material.

The Court of Appeals concluded that the above argument represents a misunderstanding of the materiality requirement. *Roberts*, 534 F.3d at 570-571; (App. 19a). The court cited to *United States v. Reynolds*, 189 F.3d 521, 525 (7th Cir. 1999), wherein the Seventh Circuit stated, "[a] statement is material if it would be *capable* of influencing the decision maker's decision . . . there is no requirement that the statement must *in fact* influence the decision-maker (that would be reliance)." (Emphasis added in the Opinion). (App. 19a). The Court of Appeals erred in failing to recognize that this citation wholly supports the Petitioner's position.

The Petitioner has argued that the evidence was insufficient for the jury to conclude that the alleged misstatements were *capable* of influencing the VA's decision to issue benefits. The VA may not legally make an award of PTSD disability benefits based on an uncorroborated stressful event. Whether they have done so is a matter within the jurisdiction of the CAVC, and they have yet to rule on the question. There is no dispute that the claimed stressor occurred or that the Petitioner was stationed at the location where the event occurred. According to the testimony heard by the jury, that alone was sufficient to issue the benefits. There was no dispute that the Petitioner was stationed at the base where Holland died in an accident after being crushed by a plane. Therefore, there was no dispute that the Petitioner did not misrepresent the only facts which were material to the "decision maker's decision."

4. The evidence was insufficient to establish, beyond a reasonable doubt, that the alleged misrepresentations were made with the intent to defraud.

The Court of Appeals concluded that "the record might also have supported a jury determination that Mr. Roberts sincerely believed that his statements were true and that he had no intention to defraud the Government . . ." *Roberts*, 534 F.3d at 571; (App. 20a). Yet, the court erroneously concluded that "the jury was entitled to infer from the evidence that his motive . . . was to defraud the Government . . ." *Id.* The only evidence offered regarding the Petitioner's intention in making the factual assertions was offered by Dr. Donald Dozier, who diagnosed the Petitioner with PTSD. Dozier considered the possibility that the Petitioner may have been misrepresenting facts to receive benefits, but determined that the Petitioner was in fact telling the truth, and that the basis for the claim was valid.

There was no evidence that any misstatements were made willfully or with intent to defraud. The portions of the statement of facts that were shown to be incorrect were not material to the VA's determination of the Petitioner's eligibility for benefits. Viewing the evidence in a light most favorable to the government, a rational trier of fact could not have found each of the necessary elements of wire fraud to have been proven beyond a reasonable doubt.

C. The Court of Appeals Erred in Failing to Find that The Petitioner's Right to Due Process was Violated When the Government Withheld Material Information.

The Court of Appeals first erred in concluding that the Petitioner waived this issue. *Roberts*, 534 F.3d at 571-72; (App. 21a). On January 13, 2006, the Petitioner filed a motion for production of favorable information. By filing this motion, the Petitioner preserved this issue for appeal. The Petitioner informed the court on several occasions that he believed the government was withholding evidence. *Id.* This issue was preserved for appellate review.

Even if the Petitioner had not sought disclosure of exculpatory evidence, the duty to disclose is constitutionally required even in the absence of such a request. See *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). A prosecutor has the obligation to learn of any favorable evidence and to turn such evidence over to the defendant. *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The failure to comply with this duty, especially in the face of a specific request for such information, constituted a violation of the Petitioner's substantial constitutional rights.

The Court of Appeals erred in concluding that the Petitioner did not provide any proof that the government withheld evidence, or that such evidence would be exculpatory. The numbering on the back of the thirteen photographs included in the report prepared by Jerry Fuchs in investigating the Holland incident makes it clear that there were other

photographs which were also taken, but not included in that particular report. The trial transcript clearly shows that there were several more photographs taken at the time of the rescue attempt. Only one of the thirteen pictures attached to the Fuchs report was taken during the rescue attempt.

Fuchs testified that when the alarm sounded photographers ran to the scene and took pictures. Additional photographs were taken and were in the possession of the government but not produced.

Second, the photographs taken during the rescue attempt which have not been disclosed are material to the Petitioner's defense. The government's entire case relied upon convincing the jury that the Petitioner was not present and that any variances between their version and that of the Petitioner showed that he intentionally misrepresented the facts. Photographs of the scene would have assisted in showing that the Petitioner's version was in fact accurate and that he was present. The government was the only party in a position to release the evidence, and chose not to.

Despite the Petitioner's request for all materials to which he was entitled under *Brady v. Maryland*, 373 U.S. 83 (1963), the government intentionally withheld material information. This was a violation of the Petitioner's right to due process.

CONCLUSION

The Petitioner, Keith A. Roberts, was forced to defend himself in a criminal prosecution for fraudulently accepting payments for disability benefits from the U.S. Department of Veterans Affairs while

the appeal of the termination of those benefits was pending at the U.S. Court of Appeals for Veterans Claims.

The Petitioner urges the Court to grant review of this unprecedented case which is of significant concern to the nations veterans and their families.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-1546

[Filed July 7, 2008]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEITH A. ROBERTS,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 05 CR 118—**William C. Griesbach**, *Judge*.

ARGUED OCTOBER 25, 2007
DECIDED JULY 7, 2008

Before EASTERBROOK, *Chief Judge*, and RIPPLE and KANNE, *Circuit Judges*.

RIPPLE, *Circuit Judge*. On September 13, 2005, Keith Roberts was charged with five counts of wire fraud in violation of 18 U.S.C. § 1343. The indictment alleged that Mr. Roberts had devised and participated

in a scheme to defraud the Government by making false statements in an effort to obtain more than $320,000 in veterans' benefits. A jury trial was held, and Mr. Roberts was convicted of all five counts. The district court sentenced Mr. Roberts to 48 months' imprisonment and ordered restitution in the amount of $262,943.52. For the reasons set forth in this opinion, we affirm the judgment of the district court.

I

BACKGROUND

A.

Mr. Roberts served on active duty in the United States Navy from March 22, 1968 until December 23, 1971, when he received an honorable discharge. During the majority of his time in the service, he was stationed at the Naval Air Facility in Naples, Italy, a non-combat support facility for naval operations in the Mediterranean. As an enlisted airman, Mr. Roberts was one of the lowest-ranked men at the base. Approximately 350 military personnel were assigned to the Naples facility. Like all military facilities, it operated at all times under a chain of command.

While Mr. Roberts was stationed in Naples, a traumatic event occurred on the base. On February 4, 1969, Airman Gary Holland was performing maintenance on a C54 aircraft when the plane's front landing gear collapsed. As a result of the collapse, Airman Holland was pinned inside the nose wheel well. He was trapped for approxi-mately twelve to fifteen minutes before his shipmates were able to raise the plane's nose and extricate him. Airman Holland

was non-responsive at all times while he was trapped in the wheel well, and he never regained consciousness. He died the next day due to the injuries he had sustained in the accident.

The aviation safety officer on the base, Lieutenant Commander Jerry Lee Fuchs, conducted an official investigation of the incident. His investigation concluded that the accident had been caused by the use of a non-regulation ground lock safety pin in the plane's front landing gear. Airman Holland accidentally had dislodged the pin during maintenance. Lieutenant Commander Fuchs prepared a detailed report of his findings (the "accident report"). The accident report included his own eyewitness account, approximately 20 witness statements, photographs of the scene, photographs and data from a re-enactment, and Airman Holland's death certificate and death report form. Mr. Roberts was not mentioned in the accident report.

B.

The United States Department of Veterans Affairs ("VA") pays veterans two types of disability benefits: pension benefits and compensation benefits. Pension benefits are need-based benefits paid to low income combat-era veterans[1] who reach the age of 65 or become substantially disabled due to non-service-connected conditions. These payments supplement the veteran's income, including other retirement or Social Security income, in order to bring his total income up

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[1] Mr. Roberts qualified as a combat-era veteran because he had served during the Vietnam War.

to a minimum level set by Congress. Compensation benefits, by contrast, are paid, regardless of need, to veterans who suffer from service-related disabilities. Compensation benefits have a higher ceiling than pension benefits; however, the amount varies according to the severity of the veteran's disability. A veteran cannot receive simultaneously both a disability pension and disability compensation benefits.

Mr. Roberts received an honorable discharge in December 1971. Sixteen years later, in February 1987, he filed his first of many claims for benefits with the VA. Mr. Roberts' initial claim was for non-service-connected pension benefits. He alleged that a recent heart attack had rendered him 100 percent disabled and that his income was below the minimum level set by Congress. The VA concluded that Mr. Roberts' alleged disabilities were not sufficiently severe to prevent his gainful employment, and it therefore denied his claim.

In November 1990, Mr. Roberts renewed his claim for pension benefits. Along with his previous allegations of heart disease, he alleged that he suffered from non-service-connected depression, high blood pressure, angina, a pulmonary blood clot, elbow bursitis and back pain. He also stated that he had been under psychiatric treatment for manic depression since his 1987 heart attack. In addition to his claim for pension benefits, Mr. Roberts also filed a claim for service-connected compensation benefits. He alleged that he suffered from a knee condition and hearing loss that had been sustained during active duty. Concluding that Mr. Roberts had failed to show

sufficient disability, however, the VA denied both of these claims.

Mr. Roberts appealed this finding. In March 1993, the VA reexamined his claim and determined that he had a combined non-service-connected disability rating of 80 percent. Accordingly, it granted him a pension benefit, retroactive to November 14, 1990. This pension benefit was based on his alleged depression and personality disorders, heart disease and other non-service-related ailments; it was not based on any service-connected disabilities.

In August 1993, Mr. Roberts filed a claim for compensation benefits. He claimed that he suffered from a service-connected personality disorder. His application read "13 Dec 1969 - Acute Personality Disorder,"[2] but it contained no supporting facts regarding his condition or its allegedly service-related cause. The VA denied his claim.

In February 1994, Mr. Roberts filed a request for compensation benefits. This claim was based on allegations that he suffered from post-traumatic stress disorder ("PTSD") stemming from an incident that occurred during the time he was on active duty. The VA provides compensation benefits for veterans disabled by PTSD if they can show (1) an official diagnosis of PTSD, (2) credible evidence that a sufficiently traumatic event occurred during active military service (an "in-service stressor") and (3) evidence that the in-service stressor is causally related to the PTSD. *See* 38 C.F.R. § 3.304(f). The claim

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[2] This date was nearly a year after Airman Holland's death.

submitted by Mr. Roberts, however, did not identify his in-service stressor, and it offered no evidence that he had been diagnosed with PTSD based on a psychological or psychiatric examination. The VA therefore sent a letter to Mr. Roberts informing him that he must provide both a detailed account of his in-service stressor and evidence of an official PTSD diagnosis before it could award him benefits. Mr. Roberts did not respond in a timely fashion; the VA therefore denied his claim.

In December 1994, Mr. Roberts renewed his claim for compensation benefits based on PTSD. This time, he submitted a handwritten statement in which he identified as his in-service stressor the incident involving Airman Holland's death. This statement described his allegedly close relationship with Airman Holland, who he claimed had been his "very good friend." R.58 at 27. He also asserted that he had been substantially involved in Airman Holland's rescue.

Specifically, Mr. Roberts recounted that he had been "left in charge of the line shack" on the day of the incident, and therefore he had authority to run any rescue operations on the base. *Id.* He stated that, immediately after the plane's nose wheel collapsed, he had "proceeded to sound the alarm" and "run over to the plane to assess the situation." *Id.* He alleged that he had found Airman Holland "still conscious and coherent" under the plane and "informed him that [he] would get him out." *Id.* Mr. Roberts stated that he then went next door, informed the Chief Petty Officer ("CPO") of the situation and then "ordered him to bring a Cherry Picker into the front of the hangar to lift the plane." *Id.* According to Mr. Roberts, he then ordered another superior to load men inside the rear of

the plane in an effort to take weight off the front wheels, and he ordered the CPO to "puncture the radome of the plane to lift it up." *Id.* At this point, a lieutenant commander allegedly "ordered [him] to stop" giving orders and, when he refused, ordered a Marine to place him under arrest. *Id.*

Mr. Roberts explained that the lieutenant commander "then proceeded to have air bags placed under the plane to lift it," a method that "took approximately 10-12 min." *Id.* He asserted that his proposed method of lifting the plane by puncturing its nose with the forklift would have taken "only a few minutes," but that the lieutenant commander had said that "it was more important to save the plane than it was to save the man." *Id.* at 27-28. Mr. Roberts further averred that, when the plane rose enough for Airman Holland's arm to fall free, he "broke away from the Guard" and, with the help of another shipmate, extracted Airman Holland and took him to receive medical attention. *Id.* at 28. He stated that an awaiting corpsman revived Airman Holland by administering a shot of adrenaline in the heart. Nevertheless, Airman Holland died the next day due to injuries sustained in the accident. Mr. Roberts concluded his statement by asserting his firm belief that Airman Holland "would have lived if [Mr. Roberts] had not been thwarted in [his] rescue attempts" by Navy leadership. *Id.*

Despite this detailed description of his in-service stressor, in January 1995, the VA again denied Mr. Roberts' claim for PTSD benefits. It explained that he lacked any confirmation, other than his own report, of the fact that the alleged in-service stressor had

occurred; it also noted that he had failed to include any record of an official PTSD diagnosis.

Through some effort, Mr. Roberts was able to obtain a copy of the accident report from the Navy in 1997. He subsequently submitted three pages from the report, including Airman Holland's death certificate and death report, to supplement his previous PTSD claim. These documents served as the necessary confirmation of his alleged in-service stressor. A VA psychologist then examined Mr. Roberts and diagnosed him with PTSD.

The VA rated the extent of Mr. Roberts' disability at 50 percent. Because the 50-percent compensation payments would have been lower than the pension benefits that Mr. Roberts already was receiving, however, Mr. Roberts elected to continue receiving his pension payments rather than compensation benefits.

In December 1998, expressing disagreement with the VA's original 50-percent disability rating, Mr. Roberts renewed his claim for compensation benefits based on PTSD. Another VA psychologist, Dr. Michael Marcy, examined Mr. Roberts. During his examination, Mr. Roberts complained of fatigue, a lack of interest and motivation, an inability to concentrate and flashbacks. He told Dr. Marcy that he attributed many of his symptoms to the death of a friend during his time of service in the Navy. Specifically, he stated his belief that Navy leaders had responded inappropriately to the accident and improperly had impeded him from directing the rescue effort. He claimed to have a distrust of authority resulting from this incident, and he stated that he often had nightmares about the accident. Dr. Marcy concluded

that, because of the death of his friend, Mr. Roberts had become emotionally and socially isolated, suffered from intrusive recollections, drank alcohol to forget the incident, distrusted authority and had occasional suicidal thoughts. Based on Mr. Roberts' description of the incident and his reported symptoms, Dr. Marcy diagnosed him with PTSD.

In May 1999, based on a review of Mr. Roberts' file and Dr. Marcy's diagnosis, the VA rated Mr. Roberts as 100 percent disabled. Accordingly, it granted him full compensation benefits for his PTSD, retroactive to August 4, 1993. Mr. Roberts received these benefits—including a large lump sum for the retroactive benefits—by direct deposit into his bank account.

In March 2002, Mr. Roberts filed another claim with the VA. This time, he asserted that his PTSD benefits should have been applied retroactively to December 23, 1971, his active duty discharge date. In August 2003, the VA agreed to pay compensation benefits retroactively from July 16, 1992, but not from his date of discharge. Mr. Roberts was not satisfied with that effective date, and, in December 2003, he contacted Special Agent Ray Vasil of the VA Office of Inspector General. He claimed that the VA's denial of an earlier effective date for his benefits was in violation of the law, and he asked Agent Vasil to review his claims.

In response to Mr. Roberts' requests, Agent Vasil obtained his file. In the process of reviewing his claims, however, Agent Vasil became curious about Mr. Roberts' statements indicating that he had directed the Holland rescue effort. Consequently, he

began an investigation into Mr. Roberts' claims. He questioned Mr. Roberts about the Holland incident on two separate occasions. Agent Vasil also obtained the accident report from the Navy, which the VA had been unable to obtain prior to that point. Finally, he interviewed several surviving witnesses, including: Fuchs, the author of the original incident report; Jack Tankersley, who had operated the forklift used during the incident; Keith Dreher, who had extricated Airman Holland and brought him to the awaiting corpsman for treatment; Martin Sunglao, who claimed to have been Airman Holland's best friend on the base; and others who had been at the scene.

These witnesses completely contradicted Mr. Roberts' version of the story. They explained that airmen had no authority on the Naples base and that they did not remember an airman running the rescue operation—which, they noted, would have been highly unusual. They stated that they also did not remember any other disturbance or arrest at the scene. They told Agent Vasil that the plane had not been raised by airbags, as Mr. Roberts had stated; instead, it had been raised by a forklift using straps. Tankersley averred that no airman had ordered him to do anything; he also noted that he had never considered puncturing the plane's radome because it was made of composite materials, and putting the forklift through the radome would not have lifted the plane. The witnesses consistently stated that Airman Holland had been neither conscious nor coherent during the time that he was trapped under the plane, and they agreed that he had not been revived after the incident. Finally, Sunglao, who claimed to have been Airman Holland's best friend, told Agent Vasil that he did not remember Mr. Roberts and that, given this fact, it was

unlikely that Airman Holland and Mr. Roberts had been roommates or friends.

The VA Office of Inspector General compiled Agent Vasil's findings in a report and concluded that Mr. Roberts had not been present during Airman Holland's accident and attempted rescue. Based on this report, the VA informed Mr. Roberts in August 2004 that it was discontinuing his compensation payments.

In June 2005, Mr. Roberts appealed this cessation of his benefits to the Board of Veterans' Appeals. He claimed that his PTSD in fact had been caused primarily by a *different* in-service stressor—an incident that had occurred in December 1969, when he was arrested by the Shore Patrol for intoxication, taken to a hospital, placed in a straightjacket and given Thorazine. The Board of Veterans' Appeals affirmed the VA's decision to discontinue payment of PTSD benefits to Mr. Roberts.

Mr. Roberts then appealed the decision of the Board of Veterans' Appeals to the United States Court of Appeals for Veterans Claims, where, according to the record before us, it currently is pending.

C.

On September 13, 2005, while his appeal was pending before the Court of Veterans' Appeals, a grand jury returned a superceding indictment that charged Mr. Roberts with five counts of wire fraud, in violation of 18 U.S.C. § 1343. The indictment alleged that Mr. Roberts had provided materially false information to the VA in a scheme to obtain fraudulently veterans' benefits. It further alleged that Mr. Roberts had

received these benefits through interstate wire communications in the form of electronic funds transfers from the Department of Treasury's financial center in Austin, Texas, to his bank account in Bonduel, Wisconsin.

The matter proceeded to a jury trial. At the conclusion of the Government's case in chief, Mr. Roberts filed a motion for judgment of acquittal based on insufficiency of the Government's evidence, which the district court denied. On November 8, 2006, a jury found Mr. Roberts guilty of all five charged counts. After a hearing, the district court sentenced Mr. Roberts to 48 months' imprisonment as well as restitution in the amount of $262,943.52. Mr. Roberts timely appealed his conviction and his sentence.

II

DISCUSSION

A.

Mr. Roberts first submits that the district court should have dismissed this case for lack of jurisdiction. He points to the fact that his criminal conviction was based upon a determination of the truthfulness of the statements that he made in his claims for veterans' benefits—an issue currently being litigated in the appeal of his benefits stoppage that is pending before the Court of Appeals for Veterans Claims. Because that court has exclusive jurisdiction to review decisions of the Board of Veterans' Appeals regarding

benefit claims,[3] and it has not yet made a final determination regarding the truthfulness of his claims, Mr. Roberts contends that the criminal case was both premature and beyond the jurisdiction of the district court.[4]

This contention is without merit. As Mr. Roberts notes in his jurisdictional statement on appeal, the district court had jurisdiction in this case based on 18 U.S.C. § 3231, which provides for jurisdiction over "all offenses against the laws of the United States." The district court did not "review" the decision of the Board of Veterans' Appeals regarding his disability rating or entitlement to benefits; instead, it simply judged whether Mr. Roberts had committed a federal crime in the process of obtaining these benefits.

Although both the criminal case in the district court and the benefits appeal before the Court of

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[3] *See* 38 U.S.C. § 7252(a) ("The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals."); 38 U.S.C. § 511 ("The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans . . . the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court.").

[4] Mr. Roberts makes an additional, amorphous due process claim based on 38 U.S.C. § 6103 and 38 C.F.R. § 14.561. His claim seems to be that his criminal prosecution circumvents statutory administrative remedies in place for veterans and forces him to defend himself in two separate forums simultaneously. This assertion, however, was made for the first time on appeal and therefore was forfeited. *McCann v. Mangialardi*, 337 F.3d 782, 786-87 (7th Cir. 2003).

Appeals for Veterans Claims involve the question of whether Mr. Roberts made false statements in his veterans' benefits claims, the criminal prosecution is independent of the administrative review process. Indeed, 38 C.F.R. §§ 1.200-05 requires VA employees to report information about actual or possible criminal violations to appropriate law enforcement entities for criminal investigation. Mr. Roberts points to no statutory or regulatory provision that bars criminal prosecution until a veteran's benefits adjudication becomes final.[5] We conclude that the district court properly denied Mr. Roberts' motion to dismiss for lack of jurisdiction.

B.

Mr. Roberts next challenges the sufficiency of the evidence supporting his conviction. The standard of review for sufficiency of the evidence challenges is necessarily "a daunting one," however: The defendant must show that, "after viewing the evidence in the light most favorable to the prosecution, no rational

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[5] In his reply brief, Mr. Roberts for the first time mentions 38 C.F.R. § 14.561, which provides that "[b]efore a submission is made to the U.S. Attorney in cases involving personnel or claims, the General Counsel . . . or the Regional Counsel . . . will first ascertain that necessary administrative or adjudicatory (forfeiture (see Pub.L. 86-222; 73 Stat. 452), etc.), action has been taken; except that in urgent cases such as breaches of the peace, disorderly conduct, trespass, robbery, or where the evidence may be lost by delay, or prosecution barred by the statute of limitations, submission to the U.S. Attorney will be made immediately." Even if this regulation gave Mr. Roberts some cognizable right to prevent early deferral, arguments raised for the first time in a reply brief are waived. *Pugel v. Bd. of Trs. of Univ. of Ill.*, 378 F.3d 659, 669 (7th Cir. 2004).

trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Carrillo*, 435 F.3d 767, 775 (7th Cir. 2006) (internal quotation marks and alterations omitted). We shall not "weigh the evidence or second-guess the jury's credibility determinations" on appeal. *Id.*

To obtain a conviction for wire fraud under section 1343, the Government must demonstrate: "(1) the defendant's participation in a scheme to defraud; (2) the defendant's intent to defraud; and (3) the defendant's use of the . . . wires . . . in furtherance of the fraudulent scheme." *United States v. Radziszewski*, 474 F.3d 480, 484-85 (7th Cir. 2007); *see also United States v. Sloan*, 492 F.3d 884, 890 (7th Cir. 2007); *United States v. Strickland*, 935 F.2d 822, 828 (7th Cir. 1991). Mr. Roberts does not dispute that interstate wire communications were used here; he contends only that the Government presented insufficient evidence to sustain a jury finding that he had participated in a scheme to defraud.

1.

Mr. Roberts first submits that the Government failed to prove beyond a reasonable doubt that his statements to the VA regarding Airman Holland's death were false. Specifically, he contends that the jury's decision to credit the accident report and the statements of witnesses at trial over the conflicting statements of Mr. Roberts was unreasonable. He notes that the witnesses' statements were provided more than twenty years after the incident occurred, and more than a decade after Mr. Roberts made his statements to the VA. He also points to the fact that the accident report had been produced only to

determine how the accident happened, not to outline the totality of the events surrounding the rescue attempt. In his view, reliance on that report or on the stale memories of others present at the scene to discount his account of the incident was not rational.

We repeatedly have refused to question the credibility of witnesses.[6] We have noted that "it is not our role, when reviewing the sufficiency of the evidence, to second-guess a jury's credibility determinations." *Radziszewski*, 474 F.3d at 485 (internal citations, quotation marks and alterations omitted). Therefore, "we reverse credibility determinations on appeal only under exceptional circumstances, such as where it was physically impossible for the witness to observe that which he claims occurred, or impossible under the laws of nature for the occurrence to have taken place at all." *Id.* (internal quotation marks omitted). Such is not the case here.

Weaknesses in eyewitness identification testimony can be exposed through cross-examination, *see United States v. Hall*, 165 F.3d 1095, 1107 (7th Cir. 1999), and Mr. Roberts had an opportunity to cross-examine these witnesses at trial. The jury was aware of the length of time that had passed between Airman Holland's death and Mr. Roberts' trial, and it was aware of the problems inherent in using eyewitness testimony to

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[6] *See, e.g.*, *United States v. Bailey*, 510 F.3d 726, 733 (7th Cir. 2007) (explaining the extraordinary deference accorded to jury determinations of witness credibility); *United States v. Saulter*, 60 F.3d 270, 275 (7th Cir. 1995) ("Questions of credibility are solely for the trier of fact, so such arguments are wasted on an appellate court.").

prove a negative. Nevertheless, it chose to believe the testimony of the Government's witnesses and to disbelieve Mr. Roberts' version of the facts. We cannot say that the jury's decision here was unreasonable.

The Government produced a plethora of evidence that suggested Mr. Roberts' statements to the VA were false. Eight Navy veterans testified about the events surrounding Airman Holland's death, and each substantially contradicted Mr. Roberts' version of the story. Most notably, the veterans each testified that they did not remember Mr. Roberts leading the mission, and that for an airman to have assumed such responsibilities in a rescue mission would have been extremely unusual—and therefore memorable. They testified that the attemptedrescue mission had been orderly and well-managed, and they did not remember anyone being arrested or restrained at the scene. They also stated that Airman Holland had not been conscious at any point after he was crushed by the plane. One witness testified that he had been a close friend of Airman Holland, but he did not remember Mr. Roberts; therefore, he thought it unlikely that Airman Holland and Mr. Roberts had been close friends. Furthermore, the Government introduced as evidence Mr. Roberts' service records, which showed that his performance actually had improved after Airman Holland's death.

In addition to eyewitness testimony contradicting his version of events, the Government introduced evidence that Mr. Roberts had altered his story on a number of occasions. His original February 1994 PTSD claim mentioned nothing about the Holland incident. When asked in March to provide details about his in-service stressor, Mr. Roberts failed to respond until

December, nine months later; he then provided his own handwritten statement of the events surrounding Airman Holland's death. When pressed for confirmation of the in-service stressor, Mr. Roberts sent the VA only three pages of the accident report, despite the fact that he had obtained the full report from the Navy. Furthermore, although he had obtained his PTSD benefits by identifying the Holland incident as his in-service stressor, after Agent Vasil's investigation, he claimed that the primary cause of his PTSD actually had been a 1969 incident involving a straitjacket and Thorazine. Finally, the Government also offered the testimony of Agent Vasil himself, who recounted numerous conflicting statements made by Mr. Roberts during Agent Vasil's investigation of the claims.

The jury, after hearing all of the evidence from both sides, found that Mr. Roberts had made false statements to the VA. On the evidence in this record, the jury was entitled to reach that conclusion.

2.

Mr. Roberts next contends that, even if he had made false statements to the VA, the Government failed to prove that such statements were material, as required by the Supreme Court in *Neder v. United States*, 527 U.S. 1, 25 (1999). He submits that, because the VA merely requires a claimant to establish the existence of an in-service stressor and a diagnosis of PTSD, any false statements about the *extent* of his involvement in the incident would not have changed the VA's benefits determination. In his view, "no misrepresentation would be material, so long as the VA could verify that the claimed incident (Holland's

death) occurred and that the claimant was stationed at that location at that time." Appellant's Br. at 37.

Mr. Roberts misapprehends the meaning of "material" in the context of wire fraud. As we stated in *United States v. Reynolds*, 189 F.3d 521, 525 (7th Cir. 1999), "[a] statement is material if it would be *capable* of influencing the decisionmaker's decision; . . . there is no requirement that the statement must *in fact* influence the decisionmaker (that would be reliance)." *Id.* (emphasis added). The materiality inquiry addresses the *nature* of the statements made rather than the defendant's actual ability to influence the VA's decision to grant veterans' benefits. *Id.*

The Government presented testimony from a VA claims administrator that a veteran's own explanation of his role in the event had the capacity to influence the VA's decisions. Additionally, Dr. Marcy testified that he in fact had relied on the information provided by Mr. Roberts regarding both his role in the event and his relationship to Airman Holland when he diagnosed him with PTSD. The jury reasonably could have inferred that Mr. Roberts' false statements at least played a role in his obtaining his PTSD diagnosis and, subsequently, his VA benefits. The Government therefore presented sufficient evidence that Mr. Roberts' false statements were material.

3.

Mr. Roberts further contends that the Government failed to prove beyond a reasonable doubt that he had the requisite intent to defraud. To prove an intent to defraud, "we require a willful act by the defendant with the specific intent to deceive or cheat, usually for

the purpose of getting financial gain for one's self or causing financial loss to another." *United States v. Sloan*, 492 F.3d 884, 891 (7th Cir. 2007) (citations and quotation marks omitted). "Direct evidence of an intent to defraud is rare," however, and we have held that the Government may prove a specific intent to defraud through "circumstantial evidence and inferences drawn from the scheme itself that show that the scheme was reasonably calculated to deceive individuals of ordinary prudence and comprehension." *Id.*

The Government presented evidence that Mr. Roberts made false statements to the VA in an effort to obtain veterans' benefits. The record might also have supported a jury determination that Mr. Roberts sincerely believed that his statements were true and that he had no intention to defraud the Government; however, the jury was entitled to infer from the evidence that his motive in making these false statements was to defraud the Government and to obtain undeserved compensation benefits. It is beyond our authority to disturb such a finding on appeal.

In sum, we conclude that the Government presented sufficient evidence for a reasonable jury to find beyond a reasonable doubt that Mr. Roberts had committed wire fraud.

C.

Mr. Roberts next submits that the Government failed to disclose exculpatory evidence that was material to his conviction in violation of the standard set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, he alleges that the Government

deliberately failed to produce the entirety of the accident report, which he contends would have contained exculpatory evidence.

The Government correctly points out, however, that, before the district court, Mr. Roberts never challenged the completeness of the accident report. Despite having had opportunities to do so, he never requested a hearing on his *Brady* claim. Instead, Mr. Roberts simply made numerous pre-trial references to his general belief that the Government was withholding evidence from him—so often that the district court granted a motion *in limine* to bar him from making such a suggestion to the jury without first filing a specific discovery request. Nevertheless, Mr. Roberts declined to request a *Brady* hearing before the district court. Accordingly, he has waived this issue. *See United States v. Payne*, 102 F.3d 289, 293 (7th Cir. 1996).

Even if Mr. Roberts had preserved his *Brady* claim, however, it is without merit. Under *Brady*, the Government has the obligation to disclose any evidence in its possession that is both material and favorable to a defendant. *United States v. Baker,* 453 F.3d 419, 422 (7th Cir. 2006); *United States v. Fallon*, 348 F.3d 248, 251 (7th Cir. 2003). This evidence includes impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Baker,* 453 F.3d at 422. To establish a *Brady* violation, the defendant must prove three elements: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the Government, either willfully or inadvertently; and (3) the denial was prejudicial. *Baker*, 453 F.3d at 422.

Mr. Roberts' *Brady* claim is based on the accident report that was compiled during the initial investigation of the events surrounding Airman Holland's death. The report included a number of photographs, many of which were used by the Government at trial. Each photograph in the report was stamped on the back with a serial number. Based on this numbering scheme, it appears that some photographs[7] may be missing from the copy of the report provided by the Government. Mr. Roberts claims that the Government intentionally provided him with an incomplete version of the accident report because the other photographs contained evidence that would have corroborated his version of the events.

Mr. Roberts provides no evidence, however, that these allegedly missing photographs ever were included in the accident report; nor did he request a hearing on the issue. Neither party explains the significance of the numbering system on the back of the photographs; it is quite possible that the serial numbers were stamped on the photographs by the photographer or the printer well before the report was compiled.

More significantly, Mr. Roberts did not present any evidence that the Government is in possession of any of these missing photographs; nor does he provide any reason to believe that the photographs, if discovered, would be exculpatory. *See United States v. Mitchell*, 178 F.3d 904, 907 (7th Cir. 1999) (noting that "mere speculation that a government file may contain *Brady*

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[7] Specifically, photographs XAD-3170, 3174, 3175, 3178, 3182, and 3187-90 appear to be missing from the collection of photographs.

material is not sufficient to require a remand for in camera inspection, much less reversal for a new trial"); *United States v. Morris*, 957 F.2d 1391, 1402-03 (7th Cir. 1992) (explaining that the defendant must provide some evidence other than mere speculation or conjecture that evidence was exculpatory and suppressed by the Government). Consequently, Mr. Roberts' *Brady* claim must fail.

D.

Finally, for the first time on appeal, Mr. Roberts maintains that the district court violated his rights under the Sixth Amendment and the rule established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), when it determined the amount of loss for purposes of sentencing without submitting the issue to the jury. Because Mr. Roberts failed to raise this issue before the district court, however, our review is limited to plain error. *United States v. Jones*, 245 F.3d 645, 648 (7th Cir. 2001).

Under the sentencing guidelines, the base offense level for a violation of 18 U.S.C. § 1343 is 7. *See* U.S.S.G. § 2B1.1(a)(1). This offense level may be increased by up to 30 levels depending on the amount of loss attributable to the defendant's fraud. *Id.* § 2B1.1(b)(1). In the context of wire fraud, we have defined "loss" as either "actual" or "intended" loss, whichever is greater. *See United States v. Brownell*, 495 F.3d 459, 461 (7th Cir. 2007). The sentencing guidelines define actual loss as "the reasonably foreseeable pecuniary harm that resulted from the offense," and intended loss as "the pecuniary harm that was intended to result from the offense . . . including pecuniary harm that would have been

impossible or unlikely to occur." *Id.* (citing U.S.S.G. § 2B1.1).

Representatives of the VA testified that Mr. Roberts actually received $262,944.12 in improper veterans' benefits based on his fraudulent PTSD claims, and that he also had requested additional retroactive payments in the amount of $288,391.26.[8] Based on this testimony, the district court found that the total loss from Mr. Roberts' fraud amounted to $551,334.78. As this loss was in excess of $400,000, the court concluded that Mr. Roberts was eligible for a 14-level increase in his offense level. *See id.* § 2B1.1(b)(1)(H).

Because the sentencing guidelines allow a 14-level increase for a loss in excess of $400,000, compared with a 12-level increase for a loss in excess of $200,000, Mr. Roberts contends that the jury should have been allowed to find the total amount of loss involved beyond a reasonable doubt. In his view, the district court's finding of loss by a preponderance of the evidence violated *Apprendi*.

We have conclusively rejected this argument in cases where the sentence imposed is less than the statutory maximum. *See United States v. Dean*, 414 F.3d 725, 730 (7th Cir. 2005) ("With the guidelines now merely advisory, factfindings that determine the guidelines sentence do not determine the actual sentence, because the sentencing judge is not required

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[8] The Government also requested that the district court consider potential future payments in excess of $1 million; however, the court denied this request because the amount was too speculative.

to impose the guidelines sentence; and so the Sixth Amendment is not in play."); *United States v. Jones*, 245 F.3d 645, 651 (7th Cir. 2001) (holding that a district court may find facts related to sentencing by a preponderance of the evidence, so long as that determination does not result in the imposition of a sentence in excess of the statutory maximum penalty for that crime). As we noted in *Jones*, "we have repeatedly held that when a defendant is sentenced to a term of imprisonment within the statutory maximum for the crime of which he was convicted, *Apprendi* is beside the point." *Jones*, 245 F.3d at 645 (internal quotation marks omitted).

The statutory maximum sentence for a wire fraud conviction under 18 U.S.C. § 1343 is 20 years' imprisonment. Mr. Roberts was sentenced to 48 months' imprisonment and restitution in the amount of $262,943.52. We find no plain error in this sentence.

Conclusion

For the reasons set forth above, we affirm the judgment of the district court.

AFFIRMED

APPENDIX B

AO 245B (Rev. 06/05) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case Number: 05-CR-118
USM Number: 07827-089

[Dated March 6, 2007]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
KEITH A. ROBERTS	)
	)

JUDGMENT IN A CRIMINAL CASE

Terrence J. Woods
Defendant's Attorney

Timothy W. Funnell
Assistant United States Attorney

THE DEFENDANT was found guilty on counts one, two, three, four, and five of the superseding indictment, after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1343	**Wire Fraud**	**01/30/04**	**1-5**

The defendant is sentenced as provided in Pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Judgment
March 2, 2007

s/ William C. Griesbach, U.S. District Judge
Signature of Judicial Officer

March 6, 2007
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of forty-eight (48) months as to each of counts one, two, three, four and five of the superseding indictment, to run concurrently, for a total term of imprisonment of forty-eight (48) months.

* * *

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years as to each of counts one, two, three, four and five

of the superseding indictment, to run concurrently, for a total term of supervised release of three (3) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.

* * *

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without permission of the court or probation officer;
2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant is to pay restitution at a rate of not less than $100.00 per month. The defendant will also apply 100 percent of his or her yearly federal and state tax refunds toward payment of restitution. The defendant shall not change exemptions without prior notice of the supervising probation officer.
2. The defendant shall not open new lines of credit, which includes the leasing of any vehicle or other property, or use existing credit resources without the prior approval of the supervising probation officer. After the defendant's courtordered financial obligations have been satisfied, this condition is no longer in effect.

3. The defendant is to provide access to all financial information requested by the supervising probation officer including, but not limited to, copies of all federal and state tax returns. All tax returns shall be filed in a timely manner. The defendant shall also submit monthly financial reports to the supervising probation officer.
4. The defendant shall participate in a mental health treatment program and shall take any and all prescribed medications as directed by the treatment provider and participate in any psychological/psychiatric evaluation and counseling as approved by the supervising probation officer. The defendant shall pay the cost of such treatment under the guidance and supervision of the supervising probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the attached page.

	Assessment	Fine	Restitution
Totals:	$500.00	$0.00	$262,943.52

* * *

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If a defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or

percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss	Restitution Ordered	Priority or Percentage
Veterans Administration Attn: Debt Management Center Bishop Henry Whipple Federal Building P.O. Box 11930 St. Paul, MN 55111-0930		$262,943.52	
Totals:	**$**	**$262,943.52**	

* * *

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

* * *

D ☒ Payment in equal monthly installments of not less than $100.00 until paid in full, to commence 30 days after release from imprisonment to a term of supervision; or

* * *

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

* * *

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 07-1546

[Filed September 16, 2008]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEITH A. ROBERTS,
Defendant-Appellant.

Before

FRANK H. EASTERBROOK, *Chief Judge*

KENNETH F. RIPPLE, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 05 CR 118 William C. Griesbach, *Chief Judge*.

ORDER

Upon consideration of Defendant-Appellant's petition for rehearing en banc, filed on August 29, 2008, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby **DENIED**.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 07-1546

[Filed August 29, 2008]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
KEITH A. ROBERTS, Defendant-Appellant.	)

Before

KENNETH F. RIPPLE, *Circuit Judge*

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 05 CR 118 William C. Griesbach, Judge.

The following are before the court:

1. **APPELLANT'S MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OR REHEARING EN BANC OUT OF TIME,**

filed on August 20, 2008, by counsel for the appellant.

2. **MOTION FOR APPOINTMENT OF COUNSEL OF RECORD**, filed on August 19, 2008, by counsel for the appellant.

IT **IS ORDERED** that #1 is **GRANTED**. The mandate is of this court is **RECALLED**. The clerk of this court shall file **INSTANTER** and distribute the tendered copies of the appellant's Petition for Rehearing.

IT **IS FURTHER ORDERED** that #2 is **GRANTED**. Robert P. Walsh is appointed as counsel for appellant Keith A. Roberts, but not under the provisions of the Criminal Justice Act.

APPENDIX E

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 05-2425

[Filed August 12, 2008]

KEITH A. ROBERTS, APPELLANT,	)
v.	)
JAMES B. PEAKE, M.D., SECRETARY OF VETERANS AFFAIRS, APPELLEE.	)

ORDER

It is ORDERED, pursuant to Rule 34, that oral argument before Chief Judge Greene, Judges Hagel and Schoelen is set for Thursday, October 23, 2008, at 1:30 p.m. in the Courtroom at Suite 900, 625 Indiana Avenue, NW, Washington, DC 20004. Counsel for the parties are allotted 30 minutes each for presentation of argument.

DATED: August 12, 2008 FOR THE COURT:

NORMAN Y. HERRING
Clerk of the Court

By: /s/ Karen Meyers
Deputy Clerk

Copies to:

Robert P. Walsh, Esq.

VA General Counsel (027)

APPENDIX F

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 05-2425

[Filed July 8, 2008]

KEITH A. ROBERTS, APPELLANT,	)
v.	)
JAMES B. PEAKE, M.D., SECRETARY OF VETERANS AFFAIRS, APPELLEE.	)

Before GREENE, *Chief Judge*, and HAGEL and SCHOELEN, *Judges*.

ORDER

Veteran Keith A. Roberts appeals, through counsel, an August 26, 2005, decision of the Board of Veterans' Appeals (Board) that determined that a May 1998 VA regional office decision that had awarded service connection for post-traumatic stress disorder (PTSD) with dysthymia and depression was based upon fraudulent evidence and was therefore the product of clear and unmistakable error. As a result, the Board concluded that severance of service connection was

proper and denied entitlement to service connection on a secondary basis for several other conditions.

Mr. Roberts argues for reversal of the Board's determination that he committed fraud. Alternatively, he argues that the Board erred by failing to provide an adequate statement of reasons or bases for its conclusion that his claimed stressors were fabricated, and by relying on an inadequate medical examination. Mr. Roberts also contends that the Secretary breached his 38 U.S.C. § 5103A duty to assist by failing to obtain shore patrol reports or otherwise attempt to corroborate Mr. Roberts' claimed PTSD stressors. Lastly, he urges the Court to vacate the remainder of the Board decision because the matters are inextricably intertwined with the severance of service connection issue.

Mr. Roberts' original attorney, Christine M. Cote, withdrew as his counsel. Subsequently, attorney Robert P. Walsh filed an appearance as counsel for Mr. Roberts. Mr. Roberts, through new counsel and with the Court's permission, filed a supplemental brief in which he addresses, inter alia, the fundamental questions of due process and the manner in which the Secretary must proceed in benefits claims disputes where an allegation of fraud is made against a beneficiary. The Secretary filed a supplemental brief in response, and on January 31, 2008, the case was submitted to the current panel of judges. On February 12, 2008, Mr. Roberts filed an opposed motion for oral argument.

To develop this matter fully, the Court requires supplemental memoranda of law from the parties addressing the following:

1. Whether in making the determination that severance of service connection is warranted, VA must consider all alternative bases for establishing service connection for the claimed disability that are raised either by the claimant or by the record before the agency? As part of this inquiry, the parties should discuss what, if any, effect Mr. Roberts' response (*see* R. at 1356) to the rating decision proposing severance of service connection has on any VA responsibility in this regard.

2. If it is determined that VA must consider all alternative bases for establishing service connection, is the Secretary obligated under 38 U.S.C. § 5103A to assist the claimant in developing evidence in support of those bases?

3. Whether the instructions to the VA examiner who conducted the November 2004 examination upon which a VA regional office and the Board relied to conclude that Mr. Roberts did not suffer from PTSD were impermissibly suggestive, or otherwise prevented the examiner from evaluating "all accumulated evidence" as required by 38 C.F.R. § 3.105(d)?

4. What effect, if any, Mr. Roberts' February 2005 decision to cancel a scheduled VA medical examination (*see* R. at 1577-80) has on any of VA's duties related to assisting the claimant or ensuring that VA possesses adequate evidence to make a decision on the claim.

The Court also seeks clarification from Mr. Roberts whether, given the change in counsel and the

supplemental brief filed by attorney Walsh, he has abandoned any arguments made in the original brief in this case. The parties' memoranda of law should be no longer than 15 pages in length.

Furthermore, because the Court believes that oral argument will materially assist in the disposition of this appeal, the Clerk of the Court will set the matter for oral argument in Washington, D.C. after the responses of the parties have been received and as soon as the business of the Court permits. *Cf. Winslow v. Brown*, 8 Vet.App. 469, 471 (1996) (denying motion for oral argument where Court does not believe it will materially assist the disposition of the appeal).

Upon consideration of the foregoing, it is

ORDERED that, not later than 30 days after the date of this order, each party shall file with the Court, and serve on one another, a supplemental memorandum of law addressing the above questions. It is further

ORDERED that the appellant's February 12, 2008, motion for oral argument is granted in part. The Clerk of the Court will set the matter for oral argument in Washington, D.C. as soon as the business of the Court permits.

DATED: July 8, 2008 PER CURIAM.

Copies to:

Robert P. Walsh, Esq.

VA General Counsel (027)

APPENDIX G

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 05-2425

[Filed January 31, 2008]

KEITH A. ROBERTS, APPELLANT,	)
v.	)
JAMES B. PEAKE, M.D., SECRETARY OF VETERANS AFFAIRS, APPELLEE.	)

ORDER

It is ORDERED that this case is submitted to a panel composed of Chief Judge Greene, Judges Hagel and Schoelen for decision without oral argument.

DATED: JAN 31 2008

FOR THE COURT:

NORMAN Y. HERRING
Clerk of the Court

By: /s/ Wendy | |
Deputy Clerk

Copies to:

Robert P. Walsh, Esq.

VA General Counsel (027)

APPENDIX H

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 05-2425

[Filed June 25, 2007]

KEITH A. ROBERTS, APPELLANT,	)
	)
v.	)
	)
R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, APPELLEE.	)

Before GREENE, *Chief Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On August 21, 2006, Keith A. Roberts, through counsel, filed his brief, and on December 11, 2006, the Secretary filed a brief in response. On December 29, 2006, the appellant's then attorney, Christine M. Cote, filed a motion to withdraw as the appellant's counsel.

On February 16, 2007, the Court granted that motion, and on that same date, attorney Robert P. Walsh filed an appearance as counsel for Mr. Roberts. Now pending before the Court are three opposed motions filed by appellant's counsel: (1) Motion to supplement the record on appeal (ROA) out of time; (2) motion to file a supplemental brief; and (3) Motion to advance this case on the Court's docket. In his motions, the appellant seeks to address, inter alia, the fundamental questions of due process and the manner in which the Secretary must proceed in benefits claims disputes where an allegation of fraud is made against a beneficiary. In support of his motion for expedited consideration he asserts that he has been incarcerated based on a flawed prosecution and conviction for falsely receiving VA disability payments, and has therefore been deprived of his liberty.

The Secretary opposes these motions. As to the appellant's motion to supplement the ROA, the Secretary urges the Court to deny the motion because (1) it is out of time, (2) Mr. Roberts was represented by competent counsel during the appropriate time to counter-designate documents for the record, (3) most of the proposed documents were not before the Board of Veterans' Appeals (Board) at the time it rendered the decision on appeal, and (4) the appellant has not shown the relevance of documents at issue. As to the motion to file a supplemental brief, the Secretary argues again that Mr. Roberts was represented by qualified attorneys throughout ths appeal and a 30-page brief was filed by counsel addressing the issues that his new counsel wishes to address again through supplemental briefing. The Secretary also contends that a supplemental brief proposing to challenge the

validity of the appellant's criminal conviction in this Court is not appropriate.

This Court is precluded by statute from considering any material that was not contained in the "record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252(b); *Timberlake v. Gober*, 14 Vet.App. 122, 133 (2000) (stating that Court is precluded by 38 U.S.C. § 7252(b) from including in ROA, and generally from considering any material, that was not contained in record of proceedings before Secretary and Board). Therefore, as to the motion to supplement the ROA, any documents that were neither actually nor constructively part of the record of proceedings before the Board may not be included in a supplemental ROA. See *Wilhoite v. West*, 11 Vet.App. 251, 252 (1998) (per curiam order) (where relevant documents relating to veteran's claim were within Secretary's control prior to Board decision and could reasonably have been expected to be part of ROA, such documents are constructively part of the record of those proceedings). In the interests of justice, and given the unique circumstances of this matter, all other documents may be included in a supplemental ROA, and the appellant's motion to file a supplemental brief will be granted. The Court's liberality on this occasion shall not be seen as in any way condoning piecemeal litigation, upon which the Court does not look favorably. The Secretary will be afforded an opportunity to respond to the supplemental brief.

As to the motion for advancement on the Court's docket, Rule 47 of the Court's Rules of Practice and Procedure (Rules) contemplates expedited proceedings for "good cause shown." Good cause may be demonstrated through a showing of serious health

conditions, advanced age combined with failing health, and "other exceptional circumstances that make expeditious proceedings necessary to avoid an injustice to the appellant." U.S. VET. APP. R. 47. Mr. Roberts has not shown good cause for expedited treatment within the meaning of Rule 47. Further, under Rule 47, once the Court grants expedited proceedings, the briefing deadlines for the matter are accelerated by the Court. In this case, briefing has been received by the Court.

Upon consideration of the foregoing, it is

ORDERED that the appellant's motion to supplement the ROA is granted in part. The documents that postdate the Board's August 25, 2006, decision and the documents that were not part of the record of proceedings before the Board at the time it made its August 25, 2006, decision will not be included in the supplemental record. The Secretary shall transmit the supplemental record, pursuant to Rule 11(b)(3), within 20 days after the date of this order. It is further

ORDERED that the appellant's motion to file a supplemental brief is granted. Within 30 days after the date of this order the appellant shall file a supplemental brief that conforms to the page and typeface limitations in Rule 32(b) and (g) for reply briefs. It is further

ORDERED that the Secretary, within 30 days after receipt of the appellant's supplemental brief, may file a response that conforms to the page and typeface limitations in Rule 32(b) and (g) for reply briefs. It is further

ORDERED that the appellant's motion for expedited consideration is denied.

DATED: JUN 25 2007 BY THE COURT:

/s/
WILLIAM P. GREENE, JR.
Chief Judge

Copies to:

Robert P. Walsh, Esq.

VA General Counsel (027)

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 05-2425

[Filed August 31, 2005]

KEITH A. ROBERTS,	)
Appellant,	)
	)
v.	)
	)
R. JAMES NICHOLSON,	)
Secretary of Veterans Affairs,	)
Appellee.	)
	)

TRANSMITTAL OF DECISION OF BOARD OF VETERANS' APPEALS

Pursuant to U.S. Vet.App. Rule 4(c), a copy of the Board of Decision on Appeal is hereby filed with the Court and the undersigned certifies, under penalty of perjury of the laws of the United States, that on this 31st day o fAugust, 2005 a copy of said Board Decision on Appeal was mailed postage prepaid to:

Keith A. Roberts
13269 Morgan Road
P.O. Box 356
Gillett, WI 54124

/s/

MATTIE M. JOHNSON
Legal Assistant
Office of General Counsel (027T1)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202-639-4886)

Representative for the
Secretary of Veterans Affairs

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

DOCKET NO. 03-04 265

DATE 26 Aug 05 MJ

IN THE APPEAL OF	)	
KEITH A. ROBERTS	)	C 28 353 461
	)	

On appeal from the Department of Veterans Affairs Regional Office in Milwaukee, Wisconsin

THE ISSUES

1. Severance of service connection for post-traumatic stress disorder (PTSD) with dysthymia and depression.

2. Entitlement to an effective date earlier than July 16, 1992 for the grant of service connection for PTSD with dysthymia and depression.

3. Entitlement to separate compensable ratings for dysthymia and depression.

4. Whether various RO rating decisions were based on clear and unmistakable error (CUE).

5. Entitlement to service connection for tobacco use, claimed as secondary to PTSD with dysthymia and depression.

6. Entitlement to service connection for alcohol abuse, claimed as secondary to PTSD with dysthymia and depression.

7. Entitlement to service connection for a digestive disorder, claimed as secondary to PTSD with dysthymia and depression.

8. Entitlement to service connection for erectile dysfunction, claimed as secondary to PTSD with dysthymia and depression.

9. Entitlement to service connection for an eye disorder, claimed as secondary to PTSD with dysthymia and depression.

10. Entitlement to service connection for obesity, claimed as secondary to PTSD with dysthymia and depression.

11. Entitlement to service connection for chronic fatigue syndrome, claimed as secondary to PTSD with dysthymia and depression.

12. Entitlement to service connection for a personality disorder, claimed as secondary to PTSD with dysthymia and depression.

13. Entitlement to service connection for a cardiovascular disorder, claimed as secondary to PTSD with dysthymia and depression.

14. Entitlement to service connection for a pulmonary disorder, claimed as secondary to PTSD with dysthymia and depression.

15. Entitlement to service connection for arthritis of the right knee, claimed as secondary to PTSD with dysthymia and depression.

REPRESENTATION

Veteran represented by: The American Legion

WITNESSES AT HEARING ON APPEAL

The veteran and his spouse

ATTORNEY FOR THE BOARD

L. Cramp, Associate Counsel

INTRODUCTION

The veteran served on active duty from March 1968 to December 1971.

This case comes before the Board of Veterans Appeals (the Board) on appeal from rating decisions of the Department of Veterans Affairs (VA) Regional Office in Milwaukee, Wisconsin (the RO).

Procedural history

Service connection for PTSD with dysthymia and depression was granted in a May 1998 rating decision, and a 50 percent disability rating was assigned. In a May 1999 rating decision, the disability rating was increased to 100 percent, effective August 4, 1993.

In March 2002, the RO received the veteran's claim of entitlement to an earlier effective date for the grant of

service connection for PTSD with dysthymia and depression. In a June 2002 rating decision, the RO denied the claim. The veteran disagreed with the June 2002 rating decision, and the appeal was perfected with the timely submission of his substantive appeal (VA Form 9) in February 2003. Subsequently, in a March 2003 rating decision, an earlier effective date of July 16, 1992 was assigned. The veteran continued to express his disagreement with that date.

In January 2003, the RO received the veteran's claim of entitlement to separate disability ratings for his psychiatric diagnoses. He also claimed that numerous previous RO rating decisions were founded on CUE and should be revised. In a February 2003 rating decision, the RO denied both claims, as well as secondary service connection claims for cardiovascular disorders, a pulmonary disorder, arthritis of the right knee, a gastrointestinal disorder, tobacco abuse and alcohol abuse. The veteran disagreed with the February 2003 rating decision and perfected his appeals in September 2003.

In an August 2003 rating decision, the RO denied service connection for obesity, chronic fatigue, an eye disorder, and an erectile dysfunction. The veteran disagreed with the August 2003 rating decision and perfected his appeals in March 2005.

In an August 2004 rating decision, the RO proposed to sever service connection for PTSD with dysthymia and depression. Service connection was severed in two stages, in rating decisions dated in November 2004 and in January 2005. The veteran disagreed with those decisions and perfected his appeal in March 2005.

The veteran presented personal testimony at a hearing which was chaired by the undersigned Veterans Law Judge in June 2005. The transcript of the hearing is associated with the veteran's VA claims folder.

Issues not on appeal

In a March 2005 rating decision, the RO denied service connection for tinnitus and declined to reopen a claim of entitlement to service connection for hearing loss. To the Board's knowledge, the veteran has not disagreed with that decision. Accordingly, those issues are not within the Board's jurisdiction. *See Archbold v. Brown*, 9 Vet. App. 124, 130 (1996) [pursuant to 38 U.S.C.A. § 7105(a), the filing of a notice of disagreement initiates appellate review in the VA administrative adjudication process, and the request for appellate review is completed by the claimant's filing of a substantive appeal after a statement of the case is issued by VA].

At the June 2005 BVA Central Office hearing, the veteran stated that he was seeking service connection for a right knee disorder on a direct basis, as due to an injury in service. Such a claim was denied by the RO in a February 1991 rating decision. That decision was not appealed and is now final. *See* 38 U.S.C.A. § 7105 (West 2002); 38 C.F.R. §§ 3.104, 20.1103 (2004).

In January 2003, the veteran claimed entitlement to service connection for arthritis of the right knee on the basis that it was proximately due to or a result of his PTSD. In the January 2003 claim, he listed under secondary claims, "Degenerative Joint Disease, secondary to PTSD." The RO denied the claim in a February 2003 rating decision on a secondary basis

only, stating "[i]t is clear that you are claiming service connection as secondary to the PTSD." The RO did not address the issue of whether new and material evidence has been received sufficient to reopen the previously denied claim of entitlement to service connection for right knee arthritis on a direct basis, since that issue had not been raised by the veteran at the time. As that issue has not been adjudicated, it is not on appeal, and the Board will not address it further. If the veteran wishes to reopen his claim of entitlement to service connection for arthritis of the right knee on a direct basis, he should first raise the issue with the RO.

FINDINGS OF FACT

1. At the time service connection for PTSD with dysthymia and depression was severed in a November 2004 rating decision, it had been in effect since July 1992, or for more than 10 years.

2. The veteran made intentional misrepresentations of fact for the purpose of obtaining or retaining VA benefits, with knowledge that the misrepresentations may result in the erroneous award or retention of such benefits.

3. At the time the RO granted service connection for PTSD with dysthymia and depression in a May 1998 rating decision, it had not verified that there was credible supporting evidence that the veteran's claimed in-service stressor event actually occurred.

4. The facts as they were known at the time of the May 1998 grant of service connection for PTSD with

dysthymia and depression were not before the adjudicator.

5. But for the errors in the May 1998 rating decision, service connection for PTSD with dysthymia and depression would not have been granted.

6. The veteran has not alleged specific errors of fact or law in any prior final rating decision.

CONCLUSIONS OF LAW

1. The May 1998 grant of service connection for PTSD with dysthymia and depression was based on fraud on the part of the veteran. 38 U.S.C.A. §§ 501, 1159 (West 2002); 38 C.F.R. §§ 3.1(aa)(2), 3.957 (2004).

2. The May 1998 grant of service connection for PTSD with dysthymia and depression was clearly and unmistakably erroneous. 38 U.S.C.A. § 5112(b)(6) (West 2002); 38 C.F.R. § 3.105(d) (2004).

3. The criteria for severance of service connection for PTSD with dysthymia and depression are met. 38 U.S.C.A. §§ 501, 5112(b)(6), 1159 (West 2002); 38 C.F.R. §§ 3.1, 3.105(d), 3.957 (2004).

4. In the absence of a service-connected disability, the claim of entitlement to an effective date earlier than July 16, 1992 for the grant of service connection for PTSD with dysthymia and depression lacks legal merit. 38 U.S.C.A. § 5110(a) (West 2002); 38 C.F.R. § 3.400 (2004).

5. In the absence of a service-connected disability, the claim of entitlement to separate disability ratings for

dysthymia and depression lacks legal merit. 38 C.F.R. § 4.25 (2004).

6. The veteran has failed to raise a valid claim of CUE in any RO rating decisions. 38 U.S.C.A. § 5109A (West 2002); *Fugo v. Brown*, 6 Vet. App. 40 (1993); *Simmons v. Principi*, 17 Vet. App. 104 (2003).

7. In the absence of a service-connected disability, the claim that tobacco use is proximately due to or a result of PTSD with dysthymia and depression lacks legal merit. 38 C.F.R. § 3.310(a) (2004).

8. In the absence of a service-connected disability, the claim that alcohol abuse is proximately due to or a result of PTSD with dysthymia and depression lacks legal merit. 38 C.F.R. § 3.310(a) (2004).

7. In the absence of a service-connected disability, the claim that a digestive disorder is proximately due to or a result of PTSD with dysthymia and depression lacks legal merit. 38 C.F.R. § 3.310(a) (2004).

8. In the absence of a service-connected disability, the claim that erectile dysfunction is proximately due to or a result of PTSD with dysthymia and depression lacks legal merit. 38 C.F.R. § 3.310(a) (2004).

9. In the absence of a service-connected disability, the claim of that an eye disorder is proximately due to or a result of PTSD with dysthymia and depression lacks legal merit. 38 C.F.R. § 3.310(a) (2004).

10. In the absence of a service-connected disability, the claim that obesity is proximately due to or a result of

PTSD with dysthymia and depression lacks legal merit. 38 C.F.R. § 3.310(a) (2004).

11. In the absence of a service-connected disability, the claim that chronic fatigue is proximately due to or a result of PTSD with dysthymia and depression lacks legal merit. 38 C.F.R. § 3.310(a) (2004).

12. In the absence of a service-connected disability, the claim that a personality disorder is proximately due to or a result of PTSD with dysthymia and depression lacks legal merit. 38 C.F.R. § 3.310(a) (2004).

13. In the absence of a service-connected disability, the claim that a cardiovascular disorder is proximately due to or a result of PTSD with dysthymia and depression lacks legal merit. 38 C.F.R. § 3.310(a) (2004).

14. In the absence of a service-connected disability, the claim that a pulmonary disorder is proximately due to or a result of PTSD with dysthymia and depression lacks legal merit. 38 C.F.R. § 3.310(a) (2004).

15. In the absence of a service-connected disability, the claim that right knee arthritis is proximately due to or a result of PTSD with dysthymia and depression lacks legal merit. 38 C.F.R. § 3.310(a) (2004).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The veteran is seeking restoration of service connection for PTSD with dysthymia and depression. He is also seeking an earlier effective date for the grant of service connection for PTSD with dysthymia

and depression. He is seeking separate disability ratings for PTSD, dysthymia and depression. He is seeking the amendment of various RO rating decisions based on CUE. Additionally, he is seeking service connection tobacco use, alcohol abuse, a digestive disorder, erectile dysfunction, an eye disorder, obesity, chronic fatigue, arthritis of the right knee, a cardiovascular disorder, a pulmonary disorder, and a personality disorder, all of which are claimed as secondary to the (formerly) service-connected PTSD with dysthymia and depression.

In the interest of clarity, the Board will initially discuss certain preliminary matters. The Board will then address the pertinent law and regulations and their application to the facts and evidence.

The Veterans Claims Assistance Act of 2000

The Board has given consideration to the provisions of the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000) (VCAA) [codified as amended at 38 U.S.C.A. §§ 5102, 5103, 5103A, 5107) (West 2002)]. This law eliminated the former statutory requirement that claims be well grounded. *Cf.* 38 U.S.C.A. § 5107(a) (West 1991). The VCAA includes an enhanced duty on the part of VA to notify a claimant as to the information and evidence necessary to substantiate a claim for VA benefits. The VCAA also redefines the obligations of VA with respect to its statutory duty to assist claimants in the development of their claims. Regulations implementing the VCAA have been enacted. See 66 Fed. Reg. 45,620 (Aug. 29, 2001) [codified at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, and 3.326(a)].

The Board must make a determination as to the applicability of the various provisions of the VCAA to a particular claim. *See Holliday v. Principi*, 14 Vet. App. 282-83 (2001).

Severance and CUE claims

With respect to whether the severance of service connection for PTSD was proper, as will be discussed below, this essentially boils down to a decision as to whether there was CUE in the rating decision that initially granted service connection. In addition, the veteran has alleged CUE in various RO rating decisions.

Although the VCAA is generally applicable to all claims filed on or after the date of its enactment, it is not applicable to CUE claims. In *Livesay v. Principi*, 15 Vet. App. 165 (2001) the United States Court of Appeals for Veterans Claims (the Court) held that "there is nothing in the text or the legislative history of VCAA to indicate that VA's duties to assist and notify are now, for the first time, applicable to CUE motions." In concluding that the VCAA is not applicable to allegations of CUE, the Court's opinion explained that even though the VCAA is a reason to remand "many, many claims, . . . it is not an excuse to remand all claims."

In essence, the Court in *Livesay* continued to hold that the VCAA is potentially applicable to all pending claims, as it had held in *Holliday*. However, the Court further indicated that CUE claims are not conventional appeals, but rather are requests for revision of previous decisions. A claim of CUE is not by itself a claim for benefits. Thus, CUE is fundamentally

different from any other kind of action in the VA adjudicative process. A litigant alleging CUE is not pursuing a claim for benefits, but rather is collaterally attacking a final decision. Thus, a "claimant", as defined by 38 U.S.C.A. § 5100, cannot encompass a person seeking a revision of a final decision based upon CUE. As a consequence, VA's duties to notify and assist contained in the VCAA are not applicable to CUE motions. *See also* 38 C.F.R. §20.1411(c) and (d) (2004).

Based on the Court's precedential decision in *Livesay*, the Board concludes that the veteran's CUE claim and the claim of entitlement to restoration of service connection for PTSD are not subject to the provisions of the VCAA.

Notwithstanding the above, it appears that the veteran has been fully apprised of the law and regulations both as to the severance issue and the CUE claims, and he has been accorded the opportunity to present evidence and argument in support of his claim. There is nothing in the extensive record which indicates that any additional development would avail the veteran. *See DelaCruz v. Principi*, 15 Vet. App. 143, 149 (2001) [VCAA notice not required where there is no reasonable possibility that additional development will aid the veteran].

Other claims

With respect to the other claims on appeal (entitlement to separate disability ratings for the veteran's variously diagnosed psychiatric disorders, entitlement to an earlier effective date for PTSD with dysthymia and depression, and the claims of

entitlement to service connection on a secondary basis for tobacco use, alcohol abuse, a digestive disorder, an erectile dysfunction, an eye disorder, obesity, a cardiovascular disorder, a pulmonary disorder, a personality disorder, a right knee disorder, and chronic fatigue), as explained below all of these claims are premised on the existence of a service-connected psychiatric disability. However, service connection for PTSD with dysthymia and depression is no longer in effect, having been severed by the RO. As will be explained in detail below, the Board is not disturbing the severance of service connection. In the absence of the underlying service-connected disability, all of these claims fail as a matter of law.

In *Manning v. Principi*, 16 Vet. App. 534 (2002), *citing Livesay*, 15 Vet. App. 165, the Court held that the VCAA has no effect on an appeal where the law, and not the underlying facts or development of the facts, is dispositive in the matter. Therefore, based on the Court's decision in *Manning*, the Board concludes that the veteran's claims are not subject to the provisions of the VCAA.

Notwithstanding the fact that the VCAA appears to be inapplicable in these claims, the veteran has been accorded ample opportunity to present evidence and argument as required by the Court's jurisprudence in general. See also 38 C.F.R. § 3.303 (2004). The RO notified him of the evidence necessary to support his claims and assisted him extensively in obtaining evidence. The veteran has been afforded several hearings at the RO level, and presented personal testimony at a hearing chaired by the undersigned Veterans Law Judge. He has been ably represented by his service organization. The Board therefore

concludes that the veteran has been accorded appropriate due process in connection with all of his claims.

1. The propriety of the severance of service connection for PTSD with dysthymia and depression.

Pertinent law and regulations

Severance of service connection

Subject to the limitations contained in §§ 3.114 and 3.957, service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government). A change in diagnosis may be accepted as a basis for severance action if the examining physician or physicians or other proper medical authority certifies that, in the light of all accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous. This certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion.

When severance of service connection is considered warranted, a rating proposing severance will be prepared setting forth all material facts and reasons. The claimant will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor and will be given 60 days for the presentation of additional evidence to show that service connection should be maintained. Unless otherwise provided, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued,

if in order, effective the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires. 38 U.S.C.A. §§ 5109A, 5112(b)(6) (West 2002); 38 C.F.R. § 3.105(d) (2004).

Protected ratings

Service connection for any disability or death granted or continued under title 38 U.S.C., which has been in effect for 10 or more years will not be severed except upon a showing that the original grant was based on fraud or it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge. The 10-year period will be computed from the effective date of the Department of Veterans Affairs finding of service connection to the effective date of the rating decision severing service connection, after compliance with § 3.105(d). The protection afforded in this section extends to claims for dependency and indemnity compensation or death compensation. 38 C.F.R. § 3.957 (2004).

Fraud

Fraud is defined in VA regulations as an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining or retaining VA benefits, with knowledge that the misrepresentation or failure to disclose may result in the erroneous award or retention of such benefits. *See* 38 U.S.C.A. § 501 (West 2002); 38 C.F.R. § 3.1 (aa)(2) (2004).

CUE

An unappealed decision of the RO or the Board becomes final and binding and is not subject to revision on the same factual basis in the absence of CUE. Previous determinations which are final and binding will be accepted as correct in the absence of CUE. Where evidence establishes such error, the prior decision will be reversed or amended. 38 U.S.C.A. § 5109A (West 2002); 38 C.F.R. § 20.1400 (2004).

The Court has defined CUE as "an administrative failure to apply the correct statutory and regulatory provisions to the correct and relevant facts. It is not mere misinterpretation of facts." *Oppenheimer v. Derwinski*, 1 Vet. App. 370, 372 (1991).

Clear and unmistakable error is defined as a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. *Fugo v. Brown*, 6 Vet. App. 40 (1993).

To determine whether clear and unmistakable error was present in a prior determination, either the correct facts, as they were known at the time, were not before the adjudicator (i.e., more than a simple disagreement as to how the facts were weighed or evaluated) or the statutory or regulatory provisions extant at the time were incorrectly applied; the error must be undebatable and of the sort which, had it not been made, would have manifestly changed the outcome at the time it was made. *Damrel v. Brown*, 6

Vet. App. 242 (1994); *Russell v. Principi*, 3 Vet. App. 310 (1992).

The same standards apply in a determination of clear and unmistakable error in a prior decision and a determination as to whether a decision granting service connection was the product of clear and unmistakable error for the purpose of severing service connection but the reviewable evidence is not limited to that which was before the RO in making its initial service connection award. *Daniels v. Gober*, 10 Vet. App. 474 (1997).

Analysis

The veteran contends, in essence, that service connection for PTSD with dysthymia and depression should not have been severed. He contends that his original stressor statement was not fraudulent, and that the grant of service connection for PTSD with dysthymia and depression was based on additional stressors not addressed by the RO in the severance decision.

As explained immediately below, the Board will apply a two- part analysis to the matter of the propriety of severance of service connection of the psychiatric disability. First, the Board must determine whether the protection of the rating may be overcome. That essentially involves inquiry into fraud on the part of the veteran in applying for service connection. Assuming that the rating is no longer protected, the Board then must look at the propriety of the severance itself. That involved inquiry into the matter of whether service connection was established based on CUE.

In determining whether service connection for PTSD with dysthymia and depression was properly severed, the Board is principally guided by the provisions of 38 C.F.R. § 3.105(d) [severance of service connection]. That regulation initially requires that the Board make a determination as to whether the provisions of §§ 3.114 and 3.957 have been met. [38 C.F.R. § 3.114 deals with changes in the law, and is not applicable given the circumstances of this case.]

38 C.F.R. § 3.957 provides for protection of ratings that have been in effect for 10 or more years. In this case, service connection for PTSD with dysthymia and depression was ultimately granted effective July 16, 1992. The 10-year period is computed from the effective date of service connection to the effective date of the rating decision severing service connection. Here, service connection for the psychiatric disability was effective from July 1992 to January 2005, a period in excess of 10 years. Therefore, service connection has been in effect for 10 or more years, and the protection afforded under 38 C.F.R. § 3.957 applies to the veteran.

Protected rating

As set out above, under 38 C.F.R. § 3.957, where service connection has been in effect for 10 or more years, it will not be severed except upon a showing that the original grant was based on fraud, or where it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge. In this case, there is no issue with respect to whether the veteran had the requisite service or character of discharge. Accordingly, the Board must determine whether the original grant of

service connection for PTSD with dysthymia and depression was based on fraud.

Fraud

In determining whether the initial grant of service connection was based on fraud, the Board is guided by 38 C.F.R. § 3.1, which defines fraud for purposes of 38 U.S.C.A. § 1159 and its implementing regulations [38 C.F.R. § 3.957] as an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining or retaining VA benefits, with knowledge that such misrepresentation or failure to disclose may result in the erroneous award or retention of such benefits.

The Board notes that 38 C.F.R. § 3.901 (cited by the RO in the severance actions) also provides a definition of fraud for purposes of forfeiture of VA benefits. Those forfeiture provisions are not applicable in this case, however, because the veteran was "residing or domiciled in a State" at the time of the commission of the allegedly fraudulent act. See 38 C.F.R. § 3.901(d) (2004). [The Board observes in passing that the "not residing or domiciled in a State" language found in 38 C.F.R. § 3.901(d) appears to be directed chiefly at claims arising out of the Philippines. *Cf. Trilles v. West*, 13 Vet.App. 314 (2000); *see also* the specific exceptions for Philippine cases found in 38 C.F.R. § 3.905.]

While the wording of the definition in 38 C.F.R. § 3.901 is not identical to that of 38 C.F.R. § 3.1, it is quite similar, essentially defining fraud as an act committed when a person "knowingly makes[...]a false[...]statement[...]concerning any claim for benefits

under any of the laws administered by[VA](except law relating to insurance benefits)." While the RO apparently applied 38 C.F.R. § 3.901, the Board believes that 38 C.F.R. § 3.1 is in fact the more appropriate definition. While 38 C.F.R. § 3.957 does not specifically refer to any definition of fraud, 38 C.F.R. § 3.1 does refer to 38 U.S.C. § 1159, the statute that provides the authority for 38 C.F.R. § 3.957.

The Board believes that there is no prejudice to the veteran in its application of 38 C.F.R. § 3.1, as the requirements for establishing fraud are actually more rigorous under 38 C.F.R. § 3.1 than under 38 C.F.R. § 3.901, involving as they do findings as to the veteran's intent and knowledge. Accordingly, the Board will apply the definition of fraud provided under 38 C.F.R. § 3.1. Further, the Board sees no need to remand the case for re-adjudication by the RO, because the RO accorded this claim more consideration than was warranted. *Cf. Edenfield v. Brown*, 8 Vet. App. 384 (1995).

The Board additionally notes that the wording of 38 C.F.R. § 3.1 makes it clear that the Board may look not only at statements the veteran made in conjunction with his service connection claim, but also at later statements made in an effort to retain those benefits ["for the purpose of obtaining *or retaining* VA benefits"]. Accordingly, the Board has reviewed all of the veteran's statements made both in conjunction with his original claim and in conjunction with the RO's actions to sever service connection.

In his February 1994 stressor statement (Vietnam Era Stress Inventory), submitted in conjunction with the veteran's claim of entitlement to service connection for

PTSD with dysthymia and depression, the veteran described a single stressor event. He stated that in January of 1969, he was left in charge of the line shack (responsible for plane direction and any rescue mission on base) at a Naval Air Station in Naples, Italy. During this time "a very good friend" (Gary H.) was working on the nose wheel of a plane. According to the veteran, Gary H.'s coat became entangled on a safety pin, which was released, causing the plane to fall, crushing him inside the nose wheel support structure. The essence of the veteran's presentation was that he took the lead role in the rescue of Gary H. He stated as follows:

> I proceeded to sound the alarm, ran over to the plane to assess the situation at which time I found Gary still conscious and coherent. I informed him I would get him out then proceeded to go next door to the ground support unit informed a chief petty officer of the situation and ordered him to have a cherry picker into the front of the hanger to lift the plane. As I was returning to the hanger I confronted my 1st class superior and informed him to place a ladder at the rear hatch of the plane and had [him] load men into the tail section to relieve the front." I then proceeded to the front of the plane and instructed the GSE chief to puncture the [illegible word] of the plane to lift it up[. A]t this time a LCDR who informed me he was the safety officer ordered me to stop[. W]hen I refused he had me placed on arrest by a Marine guard. The LCDR then proceeded to have air bags placed under the plane to lift it up. This took approx 10-12 minutes. My method would have taken only a

> few minutes. The LCDR stated that it was more important to save the plane than it was to save the man. When the plane had risen enough, I broke away from the guard and I and another shipmate proceeded under the plane and extricated Gary to an awaiting corpsman who gave Gary a shot of adrenaline in the heart. I have always believed that Gary would have lived had I not been thwarted in my rescue attempts.

As part of a July 2004 investigation by the VA Office of the Inspector General (OIG), the Navy Judge Advocate General (JAG) was contacted, and a copy of the 1969 accident report was obtained. The OIG investigator noted that the veteran's name was not listed in any of the original witness statements and he was not in fact interviewed as a witness to the incident. The OIG investigator interviewed several of the witnesses documented in the JAG report, each of whom advised that the veteran worked in a different shop and was not present at the accident scene.

The 1969 JAG report was completed by Lt. Commander J.L.F. In March 2004, the OIG investigator contacted J.L.F. with respect to the investigation of the veteran's claim. J.L.F. stated that, at the time of the accident, he immediately reported to the scene and interviewed all personnel present who had witnessed the accident or played a part in rescue operations. When questioned if any personnel at the scene, specifically the one who was first on the scene or the one who directed rescue efforts, might not have been interviewed, J.L.F. stated no, that all those present were accounted for and interviewed. In

addition, J.L.F. stated that all interviews conducted were included in his report and none were left out.

One of the witnesses to the accident interviewed by J.L.F. was W.W.S., Airframes Shop Chief Petty Officer. In February 2004 the OIG investigator interviewed W.W.S. He stated that, at the time of Gary H.'s death, he commanded approximately 12 men in the airframe branch, and among them was Gary H. W.W.S. stated that he did not know the veteran, and that the veteran did not work in the same shop as Gary H. When shown a list of personnel at the base, W.W.S. advised that the veteran was an aviation machinist mate and worked in another shop on the other side of the hangar.

W.W.S.'s account is corroborated by the account of Lt. Commander H.R.T., who stated in the 1969 report that he responded shortly after the accident and witnessed W.W.S already present. P.W.S., Quality Assurance Officer, was also interviewed by Lt. Commander J.L.F. and stated that he responded to the hangar after hearing the alarm and found W.W.S. at the scene. T.S., also interviewed on the date of the accident by Lt. Commander J.L.F., stated that he was working with Gary H. briefly before the accident and returned soon after the accident occurred. T.S. was interviewed by the OIG investigator in January 2004. He stated that he knew the veteran and that the veteran was not at the accident scene. T.S. also stated that the veteran worked in a different shop.

The OIG investigator also spoke to S.C. in March 2004. S.C. stated that he was a 1st Class Petty Officer at the time of the accident and knew both the veteran and Gary H. His duties required him to oversee all shops at

the hangar. Samuel Chiarella did not remember seeing the veteran at the accident scene.

In short, both contemporaneous and recent interviews with numerous witnesses to the incident, as well as the official 1969 JAG investigation of the incident in question, all show that the veteran was not present and did not participate in any way in rescue attempts of Gary H. Based on this overwhelming body of evidence, including an official accident investigation report and numerous statements made by individuals who have no personal interest in the matter, the Board finds that the veteran's February 1994 account that he not only was present at the accident scene but initially led the rescue attempt, made in connection with his claim for VA monetary benefits, is unquestionably and manifestly false.

With respect to the veteran's claim that Gary H. was his "good friend," this also is clearly refuted by the OIG report. Petty Officer S.C., who knew both Gary H. and the veteran, stated that he never saw the two together. The OIG investigator also interviewed M.S. (also interviewed in the February 1969 JAG report). M.S. stated that he was a good friend of Gary H., that they shared sleeping quarters. He stated that he and Gary H. spent most of their off-duty time together sightseeing and having fun. Indeed, the commanding officer of the base asked M. S. to fly back to the United States Gary H.'s body after the accident because they were close friends. While M.S. remembered the veteran's name, he stated that neither he nor Gary H. ever socialized with the veteran, and he wasn't sure that Gary H. even knew the veteran, as his name never came up in conversation. The Board finds that M.S.'s statements are particularly significant, since he

was interviewed both in 1969 by JAG and recently by OIG. Interestingly, the veteran stated to the OIG investigator that he and Gary H. "hung out with another sailor named M.S." When confronted by the investigator with the statement of M.S. that Gary H. did not socialize with the veteran, the veteran back pedaled by responding: "I never said we were best friends."

The OIG investigator also reported that the veteran stated during an interview that he was Gary H.'s roommate at the time of the accident. However, M.S. stated that he and Gary H. shared sleeping quarters, and that the two of them were the only ones in those particular quarters.

M.S. has no particular interest in the matter of the veteran's PTSD claim, and the Board attaches great weight to his statements as those of an unbiased witness. The Board finds, based on the evidence discussed above, that the veteran's account that he was a "good friend" of Gary H. is unquestionably false.

The Board also notes that several details of the veteran's account differ from official JAG report and the statements made in connection with the OIG investigation. In particular, the veteran stated that when he responded to the scene of the incident, "I found Gary still conscious and coherent." However, the OIG investigator interviewed R.J., the Chief of the Medical Department at the Naples Naval Air Station at the time of the February 1969 incident. Dr. R.J. stated that, when he arrived on scene, Gary H. was unresponsive. When Gary H.' s body was freed from the plane, Dr. R.J. tried to resuscitate him, but determined that he was not breathing. Dr. R.J. stated

that it was he and fellow medical personnel who attempted to revive H., not the veteran. R.J.'s recent account is consistent with his account in the February 1969 JAG report.

The Board finds particularly significant the fact that the veteran changed his account once the RO proposed to sever his service-connected benefits. The veteran's recent account, as stated in a November 2004 letter and at his June 2005 hearing, appears to concede that he did not in fact participate in the rescue of Gary H., but that he was merely aware of the incident.

The change in the veteran's story appears to be based on his recently arrived-at theory that his mere presence at a military installation at which a fatality occurred constitutes a sufficient PTSD stressor. The veteran stated in his November 2004 letter that, because he was stationed at the same military base as Gary H., he became aware of the incident, and that his stressor is therefore presumed as a matter of law. Similarly, at this June 2005 hearing, the veteran stated that, because he did not need to witness Gary H.'s death and that he need only prove that he was stationed at the same base where the incident occurred. The veteran based this contention on the decisions of the Court in *Suozzi v. Brown*, 10 Vet. App. 307 (1997) and *Pentecost v. Principi*, 16 Vet. App. 124 (2002).

The Board notes in passing that the fact pattern in Suozzi and Pentecost both involved combat-related situations in Vietnam. Here, the incident in question was a non combat death in Italy To the Board's knowledge, the Court has not applied *Pentecost* to such situations, and under current law, as the Board

understands it, the veteran's mere presence on a base where a fatal event occurred does not meet the standard of either holding.

However, the cogency of the legal basis of the veteran's present argument is irrelevant to the matter under consideration, namely whether fraud exists in his previous statements, except that it underscores the veteran's shifting story. The change in the veteran's account (evidently based on his current *Pentecost*-based theory) leads inevitably to the conclusion that either his initial statements of direct involvement were intentionally false, or the more recent statements of merely being on base are intentionally false. The overwhelming body of evidence, including the veteran's more recent statements, clearly indicates that the 1994 statement was false, and that the veteran was not involved in the rescue operations as he then claimed.

In the Board's view, the change in the veteran's story to a much less dramatic version shows that his false statements and misrepresentations of fact in connection with his original claim for service connection for PTSD were intentional and were done for the purpose of obtaining and retaining VA benefits.

There is no question that the veteran had knowledge that his false statements might result in the erroneous award or retention of benefits. He was specifically notified by the RO via the September 1994, January 1995, and May 1995 rating decisions of the reasons for the initial denial of his claim for PTSD, to include failure to provide a stressor. Indeed, his dramatic 1994 statement as to the death of Gary H., quoted above, was the very centerpiece of his presentation and in fact

was the reason for the grant of service connection. [The Board observes in passing that the veteran had been attempting to secure service connection for psychiatric disability for a number of years prior to his PTSD claim, without success.] Such misrepresentation of fact and/or intentional failure to disclose pertinent facts, whether for the purpose of obtaining or retaining VA benefits, with knowledge that such misrepresentation or failure to disclose might result in the erroneous award or retention of such benefits, constitutes fraud for purposes of 38 C.F.R. § 3.1 (aa)(2).

In short, it is clear from the record in this case that the veteran deliberately distorted both his relationship with Gary H. and his presence at the scene of the accident which took Gary H.'s life because such distortion elevated the rather mundane facts (the veteran was not close to Gary H. and he was not in the immediate vicinity when Gary H. died) into what appeared on the surface to be a *bona fide* PTSD stressor (his best friend died in his arms).

The veteran's representative, in an April 2005 informal hearing presentation, that the determination that fraud has been committed is essentially a criminal question. To the extent that he asserts that the Board, which clearly has no jurisdiction in criminal matters, may not properly address the matter, the Board rejects this theory. 38 C.F.R. § 3.957 clearly requires that VA make a determination as to fraud prior to severing a protected rating. Moreover, a definition of fraud as applied to § 3.957 is specifically provided in the VA regulations. There is no indication from the regulations or elsewhere that the

determination of fraud is somehow beyond the province of VA adjudicators.

The Board believes that the standard for this determination is the benefit of the doubt standard ordinarily applied in the case of VA claims, not the standard of beyond a reasonable doubt applied in criminal cases. see 38 U.S.C.A. § 5107 (West 2002); 38 C.F.R. § 3.102 (2004); *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990). However, the Board acknowledges the Court's discussion in *Trilles v. West*, 13 Vet. App. 314 (2000), to the effect that, although no longer prescribed by regulation, VA adheres to the beyond-a- reasonable-doubt standard for determinations of fraud under 38 C.F.R. §§ 3.900 through 3.905. The Board does not believe that such is in fact correct. However, the Board will alternatively address this matter by applying the beyond a reasonable doubt standard. See *Luallen v. Brown*, 8 Vet. App. 92, 95-6 (1995), citing *Holbrook v. Brown*, 8 Vet. App. 91, 92 (1995) [the Board has the fundamental authority to decide in the alternative].

Even assuming that the beyond-a-reasonable-doubt standard applies to the Board's determination under 38 C.F.R. § 3.1, the Board finds that such standard is met in this case. The veteran's 1994 statement as to what transpired in connection with the incident involving the death of Gary H., made in connection with his claim for VA monetary benefits, is false beyond any question. There are of record not one but two official reports, that of the JAG in 1969 and VA OIG more recently, in which numerous witnesses uniformly do not place the veteran at the scene. As discussed above, the veteran himself has backed off from his 1994 statement and now contends that he was merely on the base at the time of the incident; he

did not participate in rescue operations; and he was not a good friend of Gary H.. There is currently of record no evidence which is supportive of the veteran's 1994 statement. Accordingly, the Board alternatively finds beyond a reasonable doubt that the original grant of service connection for PTSD with dysthymia and depression was based on fraud on the part of the veteran.

In summary, for the reasons stated above, the Board finds that the original grant of service connection for PTSD with dysthymia and depression was based on fraud on the part of the veteran. He presented to VA a manifestly false statement which was the basis for the grant of service connection. The protection for the veteran's rating is removed. The Board will therefore proceed with consideration of 38 C.F.R. § 3.105(d), the propriety of the severance of service connection.

CUE

Once the limitations contained in §§ 3.114 and 3.957 have been addressed, 38 C.F.R. § 3.105(d) provides that service connection can be severed only where evidence establishes that the grant of service connection is clearly and unmistakably erroneous (the burden of proof being upon the Government).

The Court has held that the same CUE standard which applies to a veteran's CUE challenge to a prior adverse determination under 3.105(a) is also applicable in the Government's severance determination under 3.105(d). See *Wilson v. West*, 11 Vet. App 383 (1998); see also *Baughman v. Derwinski*, 1 Vet. App. 563, 566 (1991); *Graves v. Brown*, 6 Vet. App. 166, 170 (1994) [holding that clear and

unmistakable error is defined the same under 38 C.F.R. § 3.105(d) as it is under § 3.105(a)).

To determine whether CUE was present in a prior determination, either the correct facts, as they were known at the time, were not before the adjudicator (i.e., more than a simple disagreement as to how the facts were weighed or evaluated) or the statutory or regulatory provisions extant at the time were incorrectly applied; the error must be undebatable and of the sort which, had it not been made, would have manifestly changed the outcome at the time it was made; and a determination that there was clear and unmistakable error must be based on the record and law that existed at the time of the prior adjudication in question. See *Damrel*, 6 Vet. App. 242; *Russell*, 3 Vet. App. 310.

However, unlike with respect to a CUE claim under 38 C.F.R. § 3.105(a), the evidence that may be considered under section 3.105(d) is not limited to the evidence before the RO at the time of the initial service connection award. See *Daniels v. Gober*, 10 Vet. App. 474, 480 (1997); cf. *Venturella v. Gober*, 10 Vet. App. 340, 342-43 (1997]. The Court reasoned that because section 3.105(d) specifically contemplates that a change in diagnosis or change in law or interpretation of law may be accepted as a basis for severance, the regulation contemplates the consideration of evidence acquired after the original granting of service connection. Thus, "[i]f the Court were to conclude that . . . a service connection award can be terminated pursuant to section 3.105(d) only on the basis of the law and record as it existed at the time of the award thereof, the VA would be placed in the impossible situation of being forever bound to a prior

determination regardless of changes in the law or later developments in the factual record." *Venturella*, at 342-43.

Here, for reasons stated immediately below, the Board finds that under either basis for finding CUE, the May 1998 rating decision which granted service connection for PTSD with dysthymia and depression was based on CUE and that service connection accordingly should be severed..

(i.) Statutory or regulatory provisions incorrectly applied

At the time of the May 1998 rating decision that granted service connection for PTSD with dysthymia and depression, VA regulations governing development of PTSD claims provided that service connection for PTSD requires medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed inservice stressor actually occurred, and a link, established by medical evidence, between current symptomatology and the claimed inservice stressor. 38 C.F.R. § 3.304 (f) (1997).

In the veteran's case, the RO simply conceded the veteran's claimed stressor without obtaining credible supporting evidence. In the May 1998 rating decision, the RO recited the veteran's claimed, and unverified, stressor of witnessing the death of fellow service person Gary H.. The RO noted that the veteran supplied a copy of Gary H.'s death certificate, which showed that he died due to a crush injury of the chest. The RO concluded, without elaboration, that "[t]he veteran's reported stressor is, therefore, considered to be corroborated." Crucially, however, the claimed

stressor was not simply that Gary H. died, but that the veteran personally participated in a rescue attempt and in subsequent efforts to extricate Gary H.'s body from the nose wheel of the aircraft, and Moreover, that he was a close personal fried of Gary H. As discussed above, such statements were incapable of corroboration because they were false.

The evidence cited by the RO (the death certificate) does not refer to the veteran's participation or presence at the time of Gary H.'s death. The death certificate, alone, in no way supported the claimed stressor event and was patently inadequate to meet the requirements of § 3.304 (f). The only other evidence in support of the claim was the veteran's own unverified statements which are inadequate to establish service connection for PTSD as a matter of law.

The error made by the RO in not seeking verification of the claimed stressor was outcome determinative. Had the RO obtained supporting evidence, as it was required to do by law, it is clear that service connection would not have been granted. The 1969 JAG report would have been available to the RO, and it clearly refuted the veteran's account that he participated in the rescue attempt and was a close personal friend of the decedent.

In short, the RO decision which granted service connection for PTSD was based on an improper reading of the law, 38 C.F R. § 3.304(f), and for that reason was clearly and unmistakably erroneous. Accordingly, the Board finds that the regulatory provisions extant at the time service connection was granted were incorrectly applied; and that such error

is undebatable, and of the sort which, had it not been made, would have manifestly changed the outcome at the time it was made.

(ii.) Correct facts not before the adjudicator

In addition to the RO's incorrect application of the regulations, there is also a second basis for finding CUE in the May 1998 rating decision. In essence, the correct facts, as they were known at the time of the decision, were not before the adjudicator. The Board so finds because, as discussed above, the veteran provided a false stressor statement which was the basis for the grant of service connection. Although the veteran clearly knew the correct facts pertaining to the incident involving the death of Gary H., he withheld that information to the RO and instead provided a different version which falsely placed himself at the center of the rescue attempt. This constitutes more than a simple disagreement as to how the facts were weighed or evaluated. The correct facts with respect to the veteran's stressor were known by the veteran, but were not before the adjudicator. Further, as has been discussed above, such error is undebatable and is of the sort which, had it not been made, would have manifestly changed the outcome of the May 1998 rating decision. Thus, the requirements for CUE are also met on this alternative basis.

Change in diagnosis

38 C.F.R. § 3.105(d) also provides an alternative method for severing service connection, in addition to CUE. That section states that a change in diagnosis may also be accepted as a basis for severance action if the examining physician or physicians or other proper

medical authority certifies that, in the light of all accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous. This certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion.

In November 2004, the RO obtained a VA medical opinion for the purpose of determining whether a diagnosis of PTSD was still appropriate given the correct facts with respect to the veteran's claimed stressor. Included with the examination request was a detailed summary of the veteran's claim history, the findings of the OIG investigation and the facts surrounding the case. The examiner reviewed the claim folder and the detailed summary and concluded that "since the veteran was not present during this incident, there does not appear to be any basis for his claim of post-traumatic stress disorder." The examiner also found that "it does not appear that [the veteran] is attempting to fake his symptoms but to use them to attain disability." Based on the finding that the veteran's report of trauma was fraudulent, the examiner concluded that "[the veteran's psychiatric] symptoms would not be consistent to a diagnosis for PTSD. His symptoms would rather be consistent to his original diagnosis [...] dysthymia on Axis I, and Axis II mixed personality disorder with antisocial and borderline traits."

The Board finds that the November 2004 VA examiner's opinion satisfies the requirements of 38 C.F.R. § 3.105(d) in providing certification that, in light of all accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous. Thus, whether on the basis of CUE in the May 1998 rating decision, or a change in diagnosis, the

requirements for severance of service connection have been met.

The Board notes that the veteran's representative challenged the November 2004 opinion in the April 2005 informal hearing, asserting essentially that, because the veteran has alternative stressors, other than the stressor discussed above, the finding that his primary stressor was fraudulent should not result in a change in diagnosis. In support of this argument, the veteran stated at the June 2005 hearing that he raised the additional stressors, not involving the death of Gary H., at the time he filed his original claim for PTSD. According to the veteran, those additional stressors include his being assaulted by the shore patrol, as well as a December 1969 psychiatric hospitalization. It is contended by the veteran and his representative that the RO acted prematurely in severing service connection for PTSD with dysthymia and depression, because it did not address whether service connection for PTSD was warranted based on the additional stressors, or whether service connection was warranted for the diagnoses of depression and dysthymia based on evidence in the service records.

The above argument is misplaced for two reasons. First, no additional stressors were in fact presented to VA in connection with the veteran's initial claim of entitlement to service connection for PTSD. Second, the existence of additional stressors does not change the fact that the veteran misrepresented the stressor involving the death of Gary H. which was relied upon by the RO in granting his PTSD claim.

The Board has reviewed the veteran's original February 1994 stressor statement and other

documents filed in connection with his claim, and can identify no reference to any stressor event other than the death of Gary H. Indeed, in the May 1998 rating decision that granted service connection for PTSD with dysthymia and depression, the RO only discussed the incident where the veteran claimed to have lead rescue attempts for Gary H.. That decision was based primarily on the diagnosis of a March 1998 VA examiner, which mentioned *only* the stressor related to the death of Gary H. as the basis for the PTSD diagnosis. It cannot therefore be argued that service connection for PTSD with dysthymia and depression was based on any additional stressors not known or discussed by the RO or the VA examiner.

The Board observes in passing that it appears that the veteran raised the purported additional stressors only after service connection for PTSD was granted and the veteran's role in the Gary H. incident was being questioned, evidently in a effort to shore up a claim which was in the process of falling apart.

The veteran argued at his June 2005 hearing that, because the stressors which were later raised by him were noted in his service records at the time of the May 1998 decision, they should have been considered by the RO in granting service connection for PTSD with dysthymia and depression. However, the veteran did not raise those incidents as stressors in connection with his original claim, or at any time prior to May 1988. The Board does not believe that the RO is somehow required to assume that every event recorded in the service records is a potential stressor that must be evaluated, when the veteran himself has not identified them as such. In short, the alleged presence in the file of other unidentified stressors doe not

change the basic fact that the RO based its May 1998 decision exclusively on one stressor, the veteran's purported participation in rescue attempts of Gary H., and no other stressors were identified at that time.

The veteran and his representative also raised the matter of additional recent medical evidence supporting a diagnosis of PTSD. Such evidence was submitted at the time of his June 2005 hearing. Among the documents submitted by the veteran is a medical report dated May 23, 2005 by Licensed Psychologist E.M.T. Ph.D. This report shows a diagnosis of PTSD and includes a review of medical records provided by the veteran. However, E.M.T. appears to base her diagnosis on "the incident pertaining to Mr. H. which occurred in 1969." The veteran's account of that incident has been found to be false. Any additional diagnosis of PTSD, no matter how recent, that is based on the veteran's false account of his in-service stressor does not constitute competent and probative evidence and does not serve to counter the opinion of the November 2004 examiner. *See* Reonal v. Brown, 5Vet. App. 458, 461 (1993) [the Board is not bound to accept a physician's opinion when it is based exclusively on the recitations of a claimant]; *see also Godfrey v. Brown*, 8 Vet. App. 113, 121 (1995).

A notation of E.M.T. that the veteran "also claimed other incidences that were traumatic for him" does not alter the Board's finding with respect to whether service connection for PTSD with dysthymia and depression was properly severed. As discussed above, the May 1998 grant of service connection for PTSD was based on a single stressor. That stressor has been found to be false and fraudulent.

The Board observes in passing that the matter of whether service connection for PTSD is warranted based on other, newly raised, stressors is an issue which is separate and distinct from the issue on appeal, severance of previously-granted service connection for a psychiatric disability. The newly-raised issue of entitlement to service connection for PTSD or any other psychiatric diagnosis has not been adjudicated by the RO since service connection for PTSD with dysthymia and depression was severed, and is not before the Board.

Procedural matters

In addition to the substantive provisions discussed above, severance of service connection requires certain procedural steps. First, a rating proposing severance must be prepared, setting forth all material facts and reasons. The claimant will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor and will be given 60 days for the presentation of additional evidence to show that service connection should be maintained. If additional evidence is not received within the 60 day period, final rating action will be taken and the award will be reduced or discontinued effective the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires. 38 U.S.C.A. §§ 5109A, 5112(b)(6) (West 2002); 38 C.F.R. § 3.105(d) (2004).

In August 16, 2004, the RO sent the veteran a proposal to sever service connection for PTSD with depression/dysthymia. The proposed rating recited the veteran's alleged stressor and recounted the findings of the OIG investigation. The proposed rating informed

him specifically, "the testimony that you have provided regarding having witnessed the accidental injury of Gary [H.] and having participated in the rescue operations of Gary [H.] are found to be fraudulent in light of the additional documentation received from the OIG. Although you were stationed at the same facility as Gary [H.], you are not found to have been present at the site or time of Mr. H's accidental injury, nor are you found to have been involved in the rescue operations. The evidence further fails to establish a close relationship between you and Mr. [H.]. As the diagnosis of PTSD is based on your report of witnessing the accident and assisting in the rescue operations, it is proposed to sever service connection for PTSD with depression/dysthymia due to fraud effective August 4, 1993, the effective date of the grant of service connection for PTSD." Service connection was not severed until November 10, 2004, thus affording the veteran more than 60 days in which to respond and present additional evidence. There is no question that the veteran received the proposed rating, as he filed a notice of disagreement with the proposal to server, dated September 14, 2004. Accordingly, the Board finds that the procedural requirements for severance under 38 C.F.R. § 3.105(d) have been met.

Conclusion

In summary, the Board finds that the original grant of service connection for PTSD with dysthymia and depression was founded on fraud on the part of the veteran, thus removing him from the protection of 38 C.F.R. § 3.957. Moreover, the grant of service connection for PTSD was founded on CUE, in that the correct facts as they were known at the time were not before the adjudicator, and the statutory or regulatory

provisions extant at the time were incorrectly applied. In addition, when the correct facts were put before a VA examiner, it was found that the diagnosis of PTSD was no longer supported. Moreover, the RO correctly followed the procedural steps outlined in 38 C.F.R. § 3.105. Accordingly, the Board finds that service connection for PTSD with dysthymia and depression was properly severed. The benefit sought on appeal is accordingly denied.

Additional comment

In an April 2005 informal hearing presentation, the veteran's representative listed as an issue on appeal entitlement to service connection for an acquired psychiatric disorder, to include PTSD. As was discussed above, the newly-raised issue of the veteran's entitlement to service connection for an acquired psychiatric disorder has not been adjudicated by the RO. Indeed, the presentation of that issue prior to the present time was obviously premature, pending resolution of the severance issue. Therefore, the newly-raised service connection issue is not currently on appeal and has no been properly developed for appellate purposes. If the veteran wishes to pursue such a claim, he may raise the issue with the RO.

The Board intimates no opinion, either factual or legal, as to the ultimate conclusion warranted as to such newly raised service connection issue.

2. Entitlement to an effective date earlier than July 16, 1992 for the grant of service connection for PTSD with dysthymia and depression.

The veteran is seeking the assignment of an earlier effective date for PTSD with dysthymia and depression.

Pertinent law and regulations

Effective dates

Unless specifically provided otherwise in the statute, the effective date of an award based on an original claim for compensation benefits shall be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(a) (West 2002); 38 C.F.R. § 3.400 (2004).

For service connection claims, the effective date is the day after separation from service or the date entitlement arose, if the claim is received within one year of separation from service, otherwise the general rule applies. 38 U.S.C.A. § 5110(b)(1) (West 2002); 38 C.F.R. § 3.400(b)(2)(i) (2004).

A retroactive increase or additional benefit will not be awarded after basic entitlement has been terminated, such as by severance of service connection. 38 C.F.R. § 3.400(0)(1) (2004).

Claims lacking legal merit

Where the law is dispositive of the claim, the claim should be denied because of lack of entitlement under the law. See *Sabonis v. Brown*, 6 Vet. App. 426 (1994).

Analysis

The assignment of an effective date for service connection is based not only upon receipt of a claim, but also on the date entitlement arose. See 38 C.F.R. § 3.400 (2004). As service connection for PTSD with dysthymia and depression has been severed and is no longer in effect, there is no entitlement. Moreover, VA regulations specifically prohibit the assignment of an earlier effective date after basic entitlement has been terminated. See 38 C.F.R. § 3.400(o)(1) (2004).

Thus, in the absence of a currently service-connected disability, the veteran's claim for an earlier effective date for PTSD with dysthymia and depression lacks legal merit and must be denied. See *Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994).

3. Entitlement to a separate compensable rating for dysthymia and depression.

The veteran is seeking separate compensable disability ratings for dysthymia and depression.

Clarification of issue on appeal

The Board notes initially that service connection was denied for dysthymia and depression in a November 1993 rating decision. The veteran appealed that denial. Service connection was granted for PTSD with

dysthymia and depression in May 1998. In January 2003, the veteran sought to have the diagnoses of dysthymia and depression assigned separate compensable disability ratings. In a February 2003 rating decision, the RO denied the claim, citing 38 C.F.R. § 4.14 [avoidance of pyramiding].

The Board notes that, with certain exceptions not applicable here, it has jurisdiction over and may address only those issues developed and adjudicated by the RO. It may not modify issues to conform to recent events, even if such change benefits the veteran. Accordingly, the Board finds that the issue now on appeal is not entitlement to service connection for dysthymia and depression. At the time of the February 2003 rating decision that is now on appeal, service connection was already in effect for dysthymia and depression. The question now on appeal involves a claim under the provisions of 38 C.F.R. § 4.25 and *Esteban v. Brown*, 6 Vet. App. 259, 261(1994), both of which state that separate disabilities arising from a single disease entity are to be rated separately.

Pertinent law and regulations

Disabilities arising from a single disease entity are to be rated separately. *See* 38 C.F.R. § 4.25(b) (2004). Separate disability ratings are possible in cases in which the veteran has separate and distinct manifestations arising from the same disability, notwithstanding VA's anti-pyramiding regulation, 38 C.F.R. § 4.14. *See Esteban v. Brown*, 6 Vet. App. 259 (1994).

Analysis

The assignment of separate disability ratings under 38 C.F.R. § 4.25 assumes and requires the existence of a service connected disability. Since the veteran filed his claim for separate ratings, service connection for PTSD with dysthymia and depression has been severed and is no longer in effect. Consequently, there is no legal basis for providing the benefits the veteran seeks. Since there is a lack of entitlement under the law, the application of the law to the facts is dispositive. *See Sabonis*, 6 Vet. App. at 430. The appeal is accordingly denied.

4. Whether various RO rating decisions were based on CUE.

The veteran has alleged that various RO rating decisions were founded on CUE.

Pertinent law and regulations

CUE

The general law and regulations governing CUE claims are set out above.

The Board notes that, in contrast to the application of CUE to severance actions, as discussed above, in general, a determination that there was CUE must be based on the record and the law that existed at the time of the prior decision. *See Russell v. Principi*, 3 Vet. App. 310 at 314 (1992).

Any claim of CUE must be pled with specificity. See Andre v. West, 14 Vet. App. 7, 10 (2000), aff'd sub

nom., Andre v. Principi, 301 F.3d 1354 (Fed. Cir. 2002).

Analysis

In his January 2003 claim, his notice of disagreement, and in other submissions, the veteran has made numerous allegations of CUE in various RO rating decisions dating back to 1987. However, for reasons that will now be addressed, the Board finds that he has not in connection with the claim alleged specific errors of fact or law in any prior final rating decision.

The Board notes initially that the veteran made has frequent references to alleged RO CUE related to various claims or claim periods. However, in many cases, he did not specifically identify a rating decision. The veteran also submitted a letter in February 2003 relating to the RO's February 2003 denial of his CUE claim. In that letter, the veteran pointed to several alleged incidents of CUE, but failed to identify any particular rating decision. Such allegations nonspecific of CUE are inadequate to raise CUE. See *Andre, supra*. Moreover, the Court has held that failure to identify the dates of the RO decisions being collaterally attacked, where multiple decisions have been rendered, renders the pleading of CUE insufficient. *See Mindenhall v. Brown*, 7 Vet. App. 271, 275 (1994).

With respect to the April 1987 rating decision that denied a non-service-connected pension, the veteran stated in his January 2003 claim that "[t]he medical evidence submitted for non-service connected disability all showed that reasonable medical minds could have determined that my disabilities precluded gainful activity . . . . This failure to assign a non-service

connected disability is therefore a Clearly Unmistakable Error." Such a claim amounts to a dispute over how the evidence was evaluated, or the weight of probative value attached to the evidence. Simply to allege CUE on the basis that previous adjudications improperly weighed and evaluated the evidence, or failed to apply the benefit-of-the-doubt doctrine, or failed to give reasons and bases, can never rise to the stringent definition of CUE. "Broad-brush" allegations of "failure to follow the regulations" or "failure to give due process" are also insufficient. *See Fugo*, 6 Vet. App. at 44.

The veteran also claimed that the May 1998 rating decision that granted service connection and assigned a 50 percent rating contained CUE because he was not notified of provisions pertaining to life insurance benefits. The veteran offered no specific argument in support of that contention. Even if there were some unspecified duty on the part of the RO to notify the veteran of life insurance benefits, under *Fugo*, the RO's failure to do so does not constitute CUE, and the veteran's contention does not constitute a valid allegation of CUE.

The veteran also alleged that a June 2002 rating decision contained CUE because the RO did not consider secondary service connection claims raised by the veteran. This, in essence, is an allegation that the RO failed to assist the veteran or to develop his claims. Similarly, the veteran stated "I do herby contend that the VA erred in their decision of May, 1993 in that they did not fully develop my claim to include service connection for my PTSD and service connection for my disabilities which reasonable medical minds should have been able to interpret as proximately due to my

PTSD." The veteran also stated, "I further contend that the VA erred in their decision of May, 1999 in that they did not fully develop my entitlements to special monthly compensation for my secondary disabilities, aid and attendance and housebound." In his June 2005 hearing, the veteran contended that his CUE claim is that the RO failed to adjudicate claims of entitlement to service connection for a psychiatric disorder that were reasonably raised in the veteran's October 1990 pension claim. He argued that this entitles him to an effective date for a psychiatric disorder as of the date of the pension claim.

In his May 2003 notice of disagreement, the veteran argued that a March 1993 rating decision that granted a non-service connected pension, contained CUE because the RO "failed, under the duty to assist, to properly consider the evidence within the March 13, 1991 examination report." The veteran also contended that the RO failed to adjudicate an October 1990 claim for pension benefits as a service connection claim.

With respect to all of these contentions, it is well-settled that allegations that VA failed in its duty to assist are, as a matter of law, insufficient to plead CUE. See *Caffrey v. Brown*, 6 Vet. App. 377, 383-84 (1994) ["an incomplete record, factually correct in all other respects, is not clearly and unmistakably erroneous"].

Specifically with respect to the allegation that the March 1991 examination report was not considered, the Board notes that the report was in past referenced and discussed by the RO in the March 1993 rating decision. Moreover, an allegation that the RO did not consider a certain piece of evidence, by itself, is

insufficient to properly plead CUE. In *Gonzales v. West*, 218 F. 3d. 1378, 1381 (Fed. Cir. 2000), the United States Court of Appeals for the Federal Circuit (Federal Circuit) held that 38 C.F.R. § 3.303(a) does not require that a rating decision discuss each piece of evidence, only that it consider all of the evidence.

In essence, for reasons set out in detail above the Board concludes that the veteran has not pointed to any error of fact or any error in the application of the law in any identified RO rating decision which would compel the conclusion that the result would have been manifestly different but for the error. Moreover, based on the veteran's failure in some instances to identify the rating decision or decisions being collaterally attacked, as well as his failure to identify the type of error that could potentially be considered CUE, many of his claims of CUE in prior rating decisions have not been pled with sufficient specificity to raise a valid claim.

The only remaining question is whether the CUE claims should be dismissed or denied. If the error alleged is not the type of error that, if true, would be CUE on its face, if the veteran is only asserting disagreement with how the VA evaluated the facts before it, if the veteran has only alleged a failure on the part of VA to fulfill its duty to assist, or if the veteran has not expressed with specificity how the application of cited laws and regulations would dictate a "manifestly different" result, the claim should be dismissed without prejudice because of the absence of legal merit or lack of entitlement under the law. See *Simmons v. Principi*, 17 Vet. App. 104 (2003); *Luallen*, 8 Vet. App. 92; *Caffrey*, 6 Vet. App. at 384. This is the situation here.

Accordingly, the veteran's appeal as to the CUE issue is dismissed.

5. Entitlement to service connection for tobacco use, claimed as secondary to PTSD with dysthymia and depression.

6. Entitlement to service connection for alcohol abuse, claimed as secondary to PTSD with dysthymia and depression.

7. Entitlement to service connection for a digestive disorder, claimed as secondary to PTSD with dysthymia and depression.

8. Entitlement to service connection for erectile dysfunction, claimed as secondary to PTSD with dysthymia and depression.

9. Entitlement to service connection for an eye disorder, claimed as secondary to PTSD with dysthymia and depression.

10. Entitlement to service connection for obesity, claimed as secondary to PTSD with dysthymia and depression.

11. Entitlement to service connection for chronic fatigue syndrome, claimed as secondary to PTSD with dysthymia and depression.

12. Entitlement to service connection for a personality disorder, claimed as secondary to PTSD with dysthymia and depression.

13. *Entitlement to service connection for a* cardiovascular disorder, claimed as secondary to PTSD with dysthymia and depression.

14. Entitlement to service connection for a pulmonary disorder, claimed as secondary to PTSD with dysthymia and depression.

15. Entitlement to service connection for arthritis of the right knee, claimed as secondary to PTSD with dysthymia and depression.

The veteran is seeking service connection for the disabilities listed immediately above. He contends that each of the claimed disabilities was incurred on a secondary basis, due to PTSD with dysthymia and depression.

As all of the secondary claims are being disposed of on the same basis, the Board will address them in a common discussion below.

Pertinent law and regulations

Secondary service connection

A disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. 38 C.F.R. § 3.310 (2004); see also *Harder v. Brown*, 5 Vet. App. 183, 187 (1993).

In order to prevail on the issue of secondary service connection, the record must show: (1) evidence of a current disability; (2) evidence of a service-connected disability; and (3) medical nexus evidence establishing

a connection between the service-connected disability and the current disability. See *Wallin v. West*, 11 Vet. App. 509, 512 (1998).

Analysis

As stated above, to warrant service connection for a disability on a secondary basis, the veteran must be service connected for the disability upon which secondary service connection claim is based, *Wallin*, 11 Vet. App. at 512. In this case, the veteran contends that all of the sundry claimed disabilities are proximately due to or a result of PTSD with dysthymia and depression.

Service connection for PTSD with dysthymia and depression has been severed and is not currently in effect. Therefore, the veteran's claims of entitlement to service connection for tobacco use, alcohol abuse, a digestive disorder, erectile dysfunction, an eye disorder, obesity, chronic fatigue, a personality disorder, a cardiovascular disorder, a pulmonary disorder, and arthritis of the right knee must be denied.

As the disposition of these claims is based on the law, and not the facts of the case, the claim must be denied based on a lack of entitlement under the law. *See Sabonis*, 6 Vet. App. at 430.

ORDER

Service connection for PTSD with dysthymia and depression was properly severed.

An earlier effective date for the grant of service connection for PTSD with dysthymia and depression is denied.

Separate disability ratings for dysthymia and depression are denied.

The claim that various RO rating decisions were based on CUE is dismissed.

Service connection for tobacco use is denied.

Service connection for alcohol abuse is denied.

Service connection for a digestive disorder is denied.

Service connection for erectile dysfunction is denied.

Service connection for an eye disorder is denied.

Service connection for obesity is denied.

Service connection for chronic fatigue is denied.

Service connection for a personality disorder is denied.

Service connection for a cardiovascular disorder is denied.

Service connection for a pulmonary disorder is denied.

Service connection for arthritis of the right knee is denied.

Barry F. Bohan
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the Court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the United States Court of Appeals for Veterans Claims. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the Court. *As long* as *you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will then have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to Court is filed on time.*

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals
for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's web site on the Internet at **www.vetapp.uscourts.gov,** and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I tile a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA stating why you believe that the BVA committed an obvious error of fact or law in this decision, or stating that new and material military service records have been discovered that apply to your appeal. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Send your letter to:

Director, Management
and Administration (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management and Administration, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is

based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management and Administration, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: **www.va.gov/vso**. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before VA, then you can get information on how to do so by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. This information as well as information about free representation through the Veterans Consortium Pro Bono Program (toll free telephone at: (888) 839-7272), is also provided on the Court's website at **www.vetapp.uscourts.gov**.

Do I have to pay an attorney or agent to represent me? Except for a claim involving a home or small business VA loan under Chapter 37 of title 38, United States Code, attorneys or agents cannot charge you a fee or accept payment for services they provide ***before*** the date BVA makes a final decision on your appeal. If you hire an attorney or accredited agent ***within* 1 *year*** of a final BVA decision, then the attorney or agent is allowed to charge you a fee for representing you before VA in most situations. An attorney can also charge you for representing you before the Court. VA cannot pay fees of attorneys or agents.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. For more information, read section 5904, title 38, United States Code.

In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to:

Office of the
Senior Deputy Vice Chairman (012)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

The Board may decide, on its own, to review a fee agreement for reasonableness, or you or your attorney or agent can file a motion asking the Board to do so. Send such a motion to the address above for the Office of the Senior Deputy Vice Chairman at the Board.

VA Form 4597
MAR 2005 (RS)

APPENDIX J

[SEAL DEPARTMENT OF VETERANS AFFAIRS UNITED STATES OF AMERICA]

DEPARTMENT OF VETERANS AFFAIRS
VA REGIONAL OFFICE
5400 W NATIONAL AVE
MILWAUKEE WI 53214-3461

Keith A. Roberts

VA File Number
28 353 461

Represented by:
AMERICAN LEGION

Rating Decision
November 10, 2004

INTRODUCTION

The records reflect that you are a veteran of the Vietnam Era. You served in the Navy from March 22, 1968 to December 23, 1971. In the letter dated 08/18/04, you were advised of our proposal to sever service connection for post traumatic stress disorder with depression/dysthymia effective August 4, 1993, and sever basic eligibility under 38 USC Chapter 35 effective April 27, 1999. You were provided due process to submit any pertinent evidence showing that the proposed action should not be taken, and were afforded

the opportunity to request a personal hearing to present evidence or argument. Neither pertinent evidence, nor a request for a personal hearing were received to date. As the due process period has expired, a final decision is being made.

The Veteran Claims Assistance Act (VCAA) of 2000 requires that VA notify the claimant and the claimant's representative, if any, of any information and any medical or lay evidence, not previously provided to VA, that is necessary to substantiate the claim. VA must also advise a claimant which evidence the claimant must supply and which evidence VA will obtain on his or her behalf. The VCAA also requires VA to make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate a claim for a VA benefit unless no reasonable possibility exists that such assistance would aid in substantiating the claim.

When considering the circumstances of the current claim as discussed below, VA has satisfied the notification and duty to assist provisions of the law and no further actions need be undertaken by VA, pursuant to VCAA, on the claimant's behalf.

DECISION

1. Service connection for post traumatic stress disorder (PTSD) with depression/dysthymia is severed effective August 4, 1993 and entitlement to basic eligibility under 38 USC Chapter 35 is severed effective April 27, 1999, due to fraud.

2. It is proposed to sever service connection for post traumatic stress disorder with depression/dysthymia to an earlier effective date of July 16, 1992.

EVIDENCE

- Rating Decision dated 08/16/04, and all evidence listed therein
- Letter to you dated 08/18/04
- Your statement received via FAX on 09/14/04
- Madison VA Hospital treatment records dated 04/03 through 09/04
- Congressional Inquiry from the Office of Congressman Mark Green received via FAX on 10/15/04 with your statement
- Milwaukee VA Medical Center Board of Psychiatric Opinion dated 11/05/04

REASONS FOR DECISION

1. Severance of service connection for post traumatic stress disorder (PTSD) with depression/dysthymia and for entitlement to basic eligibility under 38 USC Chapter 35.

Service connection for post traumatic stress disorder (PTSD) with depression/dysthymia is severed effective August 4, 1993 and entitlement to basic eligibility under 38 USC Chapter 35 is severed effective April 27, 1999, due to fraud.

In the letter dated 08/18/04, you were advised of our proposal to sever service connection for post traumatic stress disorder with depression/dysthymia effective August 4, 1993, and sever basic eligibility under 38 USC Chapter 35 effective April 27, 1999. You were

afforded due process to provide you with the opportunity to submit any pertinent evidence showing that the proposed action should not be taken, and were afforded the opportunity to request a personal hearing to present evidence or argument. To date, no request for a personal hearing has been received.

We received your statement via FAX on 09/14/04, requesting to appeal the proposal. Your request for an appeal is premature in the absence of a final decision.

In your statement to Congressman Mark Green, received at our office on 10/15/04, you noted, in essence, that the proposal to sever service connection for PTSD was a violation of VA regulations. You provided an excerpt from an unidentified BVA or CAVC decision, which referred to *Suozi* v. *Brown, 10 Vet.App. 307 (1997)* stating that "an appellant only needs to offer independent evidence of a stressful event that is sufficient to imply his or her personal exposure." Your statement and the accompanying excerpt fail to provide any evidence of probative value regarding the proposal to sever service connection based on fraud. While evidence need not completely verify that a stressful event occurred, other evidence showing that the event did not occur cannot be ignored.

As the due process period on the proposal to sever service connection has expired, a final decision is being made.

38 CFR 3.901 defines fraud as "An act committed when a person knowingly makes or causes to be made or conspires, combines, aids, or assists in, agrees to, arranges for, or in any way procures the making or

presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, concerning any claim for benefits under any of the laws administered by the Department of Veterans Affairs (except laws relating to insurance benefits)."

Your testimony, given at VA Medical Centers and to the Special Agent of the Office of the Inspector General (OIG) Department of Veterans Affairs Inspector General Office of Investigations is found to be fraudulent. As detailed in the Rating Decision dated 08/16/04, you provided testimony regarding the witnessing of the death of a "buddy" during military service, and regarding your involvement in the rescue operations. The investigation conducted by the OIG provides evidence that your testimony was fraudulent. Although you were stationed at the same facility as the deceased Airman, you are not found to have been present at the site or time of the accidental injury, nor are you found to have been involved in the rescue operations. The diagnosis of PTSD was based on your testimony of witnessing the accident in question, and assisting in rescue operations, which is found to be fraudulent.

A review of your claims folder evidence and medical opinions by a Board of Psychiatric Specialists were requested from the Milwaukee VA Medical Center. The findings, dated 11/05/04, note diagnoses of dysthymia and mixed personality disorder with antisocial and borderline traits. The opining specialists concurred on the following findings:

The evidence suggests a conduct disorder diagnosis as a child according to DSM-IV criteria. This diagnosis typically follows in adults as antisocial personality

disorder. At various times you denied any mental illness prior to the military, however the mental health assessments during military service appear to be thorough and without any note of secondary gain by you, and are therefore taken as a fair representation of your pre-military mental state. The evidence is quite clear that you did not experience a trauma which would be sufficient to cause PTSD. It is quite clear that the basis for the PTSD diagnosis was the alleged observation of the death of your "friend". There is no documented evidence (supportive of) of any other reported traumas. There does not appear to be any basis for your claim of PTSD. VA exams after March of 1991 show that you were experiencing dysthymia and mixed personality disorder with antisocial and borderline traits. It was not until 1998 that a diagnosis of PTSD was determined, based upon your witnessing the death of your "friend."

The issue of malingering was considered by the VAMC medical professionals, who determined that malingering was not an appropriate diagnosis as you had reported and were assessed as having actual ongoing mental health symptoms such as a depressed anxious mood, angry outbursts, violence toward family (spouse/children) and additional symptoms related to a mixed personality disorder with antisocial and borderline traits and dysthymia. It was therefore determined that you were not attempting to fake your symptoms, but to use them to attain disability (benefits). However, since your report of trauma is found to be fraudulent, your symptoms are not consistent with a diagnosis of PTSD.

They found that your symptoms were consistent with the original diagnosis obtained at your first

Compensation and Pension examination in March of 1991. At that time you were diagnosed with dysthymia on Axis I (clinical disorders), and mixed personality disorder with antisocial and borderline traits on Axis II (personality disorders).

The reviewing psychiatric specialists found that the pre-existing conduct disorder was not aggravated by military service. They noted that there was no specific treatment for mental illness, nor was treatment sought until approximately February of 1987, shortly following a myocardial infarction. They found that mental health issues (depression and symptoms related to personality disorder, anger, violence, relationship problems) were aggravated following the myocardial infraction. They opined that your current symptoms and diagnosis are part of a natural progression of your pre-existing illness which may have been aggravated by a non-service incident such as the myocardial infarction or another situational incident (such as the loss of a job).

They further opined that there is no evidence of a new mental health disorder during military service, and no evidence of ongoing treatment to establish aggravation of the pre-existing disorder. Although there is evidence in service consistent with an ongoing personality disorder (disciplinary problems in the military) there is no evidence of specific mental health symptoms which were beyond the level prior to military entry.

The opining specialists found there was significant documented evidence that following your heart attack, you experienced significant depression and aggressive and irritable mood symptoms, and it was at this time that you began seeking significant treatment for

mental health problems. The aggravation of mental health symptoms did not have its onset during your military service.

Based on review of the evidence, dysthymia on Axis I, and mixed personality disorder with antisocial and borderline traits on Axis II were diagnosed.

As the evidence fails to show that any current mental health disability was incurred or aggravated during military service, there is no basis to warrant service connection for a mental health disability.

Based on the finding of fraud, entitlement to service connection for PTSD with depression/dysthymia is severed effective August 4, 1993, the date of the initial grant, and basic entitlement under 38 USC chapter 35 is severed effective April 27, 1999, the date of the initial grant.

2. Proposal to sever service connection for post traumatic stress disorder with depression/ dysthymia from an earlier effective date of July 16, 1992.

It is proposed to sever service connection for post traumatic stress disorder with depression/dysthymia from an earlier effective date of July 16, 1992, which is the earliest date of established entitlement.

Service connection for post traumatic stress disorder with depression/dysthymia has been severed effective August 4, 1993, the original date of the grant. A subsequent rating decision dated March 28, 2003 provided an earlier effective date of July 16, 1992 for the grant of service connection.

As fraud is shown, it is proposed to sever service connection back to the earlier effective date of July 16, 1992.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our web site, www.va.gov.

Rating Decision

Department of Veterans Affairs Page 1
VA REGIONAL OFFICE 11/10/2004

NAME OF VETERAN
Keith A. Roberts

VA FILE NUMBER
28 353 461

SOCIAL SECURITY NR
[REDACTED] -7979

POA
AMERICAN LEGION

COPY TO
CHAMPVA
File
POA
VSCM

ACTIVE DUTY			
EOD	RAD	BRANCH	CHARACTER OF DISCHARGE
03/22/1968	12/23/1971	Navy	Honorable

LEGACY CODES			
ADD'L SVC CODE	COMBAT CODE	SPECIAL PROV CDE	FUTURE EXAM DATE
	1		None

JURISDICTION: Expiration of Due Process On 09/16/2004

SUBJECT TO COMPENSATION (1.SC)

9411 POST TRAUMATIC STRESS DISORDER WITH DEPRESSION/DYSTHYMIA
Service Connected, Vietnam Era, Incurred
100% from 07/16/1992 to 08/04/1993 (Final Severance)

COMBINED EVALUATION FOR COMPENSATION

100% from 07/16/1992
No combined % from 08/04/1993

NOT SERVICE CONNECTED/NOT SUBJECT TO COMPENSATION (8.NSC Vietnam Era)

5257 RESIDUALS, RIGHT KNEE INJURY, NOT SHOWN Not Service Connected, Not Incurred/Caused by Service
0%

6099-6079 EYE/VISION CONDITION, TO INCLUDE AS SECONDARY TO PTSD Not Service Connected, Not Secondary
0%

6100 BILATERAL HEARING LOSS, NOT SHOWN Not Service Connected, Not Incurred/Caused by Service
0%

6354 FATIGUE, TO INCLUDE AS SECONDARY TO PTSD Not Service Connected, Not Secondary
0%

6603	RESTRICTIVE PULMONARY IMPAIRMENT WITH HISTORY OF PULMONARY EMBOLI (ALSO CLAIMED AS COPD), CLAIMED SECONDARY TO PTSD Not Service Connected, Not Incurred/Caused by Service 10%
6899	TOBACCO ABUSE, CLAIMED SECONDARY TO PTSD Not Service Connected, Not Incurred/Caused by Service 0%
7005	CORONARY ARTERY DISEASE, STATUS POST MYOCARDIAL INFARCTION, WITH ANGINA (ALSO CLAIMED AS ARTERY DISEASE), CLAIMED SECONDARY TO PTSD Not Service Connected, Not Incurred/Caused by Service 30%
7399-7304	GASTROINTESTINAL DISORDER, CLAIMED SECONDARY TO PTSD Not Service Connected, Not Incurred/Caused by Service 0%
7522	ERECTILE DYSFUNCTION, TO INCLUDE AS SECONDARY TO PTSD Not Service Connected, Not Secondary 0%

7999-7903 OBESITY, TO INCLUDE AS SECONDARY TO PTSD Not Service Connected, Not Secondary
0%

9399-9326 ALCOHOL ABUSE, CLAIMED SECONDARY TO PTSD Not Service Connected, Not Incurred/Caused by Service
0%

9499 MIXED PERSONALITY DISORDER, CLAIMED SECONDARY TO PTSD Not Service Connected, Not Incurred/Caused by Service
0%

PENSION ENTITLEMENT DECISIONS (2 PT, 9 NOT PT, 11A, and 11B)

Permanent and Total for NSC from 11/14/1990

DISABILITIES CONSIDERED FOR PENSION PURPOSES ONLY

5295 DEGENERATIVE JOINT DISEASE, LUMBOSACRAL SPINE Pension, Vietnam Era
20%

5299-5227 RESIDUALS OF RIGHT FIFTH METACARPAL FRACTURE Pension, Vietnam Era
0%

5024 OLECRANON SPUR, RIGHT, WITH HISTORY OF TENNIS ELBOW Pension, Vietnam Era
0%

COMBINED EVALUATION FOR PENSION : 50%

ANCILLARY DECISIONS

Basic Eligibility under 38 USC Ch 35 from 04/27/1999 to 04/27/1999

I hereby certify that the claims record of this veteran has been reviewed, and a finding of fraud has been properly identified. The above rating is consistent with the provisions of 38 CFR 3.901.

/s/ 11/10/04
R.Granstrom, VSCM Date

21V: OIG should be notified of this rating decision and related actions.

/s/
B. Nehls, AVSCM

APPENDIX K

[SEAL DEPARTMENT OF VETERANS AFFAIRS UNITED STATES OF AMERICA]

DEPARTMENT OF VETERANS AFFAIRS
VA REGIONAL OFFICE
5400 W NATIONAL AVE
MILWAUKEE WI 53214-3461

Keith A. Roberts

VA File Number
28 353 461

Rating Decision
August 16, 2004

INTRODUCTION

The records reflect that you are a veteran of the Vietnam Era. You served in the Navy from March 22, 1968 to December 23, 1971. Since our last review of your claim, we received additional evidence on July 20, 2004. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

DECISION

It is proposed to sever service connection for post traumatic stress disorder with depression/dysthymia effective August 4, 1993, and sever basic eligibility under 38 USC chapter 35 effective April 27, 1999.

EVIDENCE

- Review of claims folder evidence considered in previous decisions
- Department of Veterans Affairs, Office of Inspector General, Office of Investigations, Report of Investigation dated 07/08/04

REASONS FOR DECISION

[Handwritten notes: 020 600 P MAPD 8/17/04 DW; PCGL 020 PCLR on CanT P600 to be cntb on MAPD 8-17-04]

Continued entitlement to compensation for post traumatic stress disorder with depression/ dysthymia, and basic eligibility under 38 USC chapter 35.

It is proposed to sever service connection for post traumatic stress disorder with depression/dysthymia due to fraud, effective August 4, 1993, and sever basic eligibility under 38 USC chapter 35 effective April 27, 1999.

Service connection for post traumatic stress disorder requires:

1. Medical evidence establishing a current diagnosis of the condition, meeting all diagnostic criteria as stated in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) published by the American Psychiatric Association; and

2. Credible supporting evidence that the claimed inservice stressor actually occurred; and

3. A link, established by medical evidence, between current symptomatology and the claimed inservice stressor.

If claimed in-service stressors are related to combat, the receipt of valor awards in service, such as the Purple Heart or the Combat Infantryman's Badge, will be accepted as combat citations for stressor verification purposes. In the absence of the receipt of valor awards in service, supporting or verifying evidence of the claimed in-service stressor(s) must be obtained. As your service records and military discharge certificate did not show that you engaged in combat or were awarded a citation for combat or valor, supporting evidence of any claimed inservice trauma was required.

North Chicago VAMC treatment records contain your statement of inservice trauma, noting that in January of 1969 you were left in charge of the Line Shack in Naples, Italy; that during this time a very good friend of yours, Gary Holland, was working in the nose wheel of a C54 which was in the hanger; that his coat became entangled on the safety pin which was released, causing the plane to fall, crushing him inside the nose wheel; that you proceeded to sound the alarm and ran to the plane to assess the situation; that you found

Gary still conscious and coherent and informed him that you would get him out; that you ran next door to the Ground Support Unit and informed a Chief Petty Officer of the situation and ordered him to bring a cherry picker into the front of the hanger to lift the plane; that you ordered others to proceed in lifting the plane; that the Safety Officer ordered you to stop, and when you refused, he had you arrested; that when the plane was lifted high enough for Holland's arm to fall out, you broke away from the guard, and with the help of another shipmate, extracted Holland to an awaiting corpsman, who gave Holland a shot of Adrenalin in the heart and revived him; that Holland was then transported by chopper to the hospital where he passed away the next day; and that you have had nightmares about Holland and a major problem dealing with stress and authority figures.

Your service records confirm that you served in the Navy from 03/22/68 to 12/23/71 as an aircraft mechanic. You were assigned to the US Naval Air Facility in Naples, Italy from 11/16/68 to 01/15/71. There is no evidence of an arrest related to the accidental injury of Gary Holland.

The Death Report for Gary Holland confirmed that he was also stationed at the Naval Air Facility in Naples, Italy, and on 02/04/69 suffered multiple contusions of the head and chest when a nose wheel strut failed and collapsed, crushing him between the nose and front wheel of the plane. He subsequently died on 02/05/69. As this evidence served to support your reported inservice trauma, your involvement was conceded and a VA examination was scheduled.

At the VA PTSD examination on 03/31/98, you described the inservice stressor as witnessing the death of your good friend Gary Holland, and pulling his crushed body from the plane. A diagnosis of PTSD, based on the inservice trauma was found, and entitlement to service connection for post traumatic stress disorder (PTSD) was subsequently granted effective 08/04/93, the date the original claim for service connection for a psychiatric disability was received.

An investigation of your reported inservice stressor was conducted by Special Agent Raymond P. Vasil, of the Office of the Inspector General (OIG) of the Department of Veterans Affairs Inspector General Office of Investigations.

You were interviewed by OIG Special Agents on 03/31/04. You reported that you suffer from PTSD resulting from the death of your "buddy" Gary Holland, and provided details as previously listed above with some additions. Among the additions was your report that you shared a room with Holland and moved off-base after the accident; that you were interviewed by the investigating officer for over an hour, although there is no record of such interview; and that you and Holland were close friends that hung out with another sailor.

The Report of Investigation dated 07/08/04 contains additional military documents and interviews that dispute your stressor statement. Specifically, although you and Gary Holland were both stationed at the US Naval Air Facility in Naples, Italy, the Investigative Report into the death of Gary Holland, dated 02/20/69,

fails to mention your name as a witness or a person involved in rescue operations.

The investigator (Special Agent Raymond P. Vasil) for the Office of the Inspector General (OIG) contacted the party in charge of the military investigation on 03/09/04, who verified that he had immediately interviewed all Naval personnel present at the scene who had witnessed the accident or played a part in rescue operations, and that all personnel present were accounted for and interviewed.

In addition, the OIG investigator interviewed multiple other witnesses, to include Mr. Holland's immediate supervisor, who is the last known person to have spoken to Mr. Holland prior to the accident, the Quality Assurance Officer, co-workers present at the time of the accident, and the medical personnel who worked on Holland after the aircraft was lifted. None of these remembered seeing you at the accident scene.

A friend of Mr. Holland's, who served with him, socialized with him, and shared sleeping quarters with him, was also interviewed. Although he was not present at the time of the accident, he did see the forklift lift the plane so the paramedics could remove Holland, and because they were such good friends, was asked to fly the body back to Florida. He remembered your name, and noted that he and Holland never socialized with you.

Fraud is defined by VA regulations (38 CFR 3.901) as an act committed when a person knowingly makes or causes to be made, or conspires, combines, aids or assists in, agrees to, arranges for, or in any way procures the making or presentation of a false or

fraudulent affidavit, declaration, certificate, statement, voucher, or paper, concerning any claim for benefits under any of the laws administered by the VA.

In your case, the testimony that you have provided regarding having witnessed the accidental injury of Gary Holland, and having participated in the rescue operations of Gary Holland, are found to be fraudulent, in light of the additional documentation received from the OIG. Although you were stationed at the same facility as Gary Holland, you are not found to have been present at the site or time of Mr. Holland's accidental injury, nor are you found to have been involved in the rescue operations. The evidence further fails to establish a close relationship between you and Mr. Holland. As the diagnosis of PTSD is based on your report of witnessing the accident and assisting in rescue operations, it is proposed to sever service connection for post traumatic stress disorder with depression/dysthymia due to fraud effective August 4, 1993, the effective date of the grant of service connection for PTSD. It is further proposed to sever entitlement to basic eligibility under 38 USC chapter 35 effective April 27, 1999, the effective date of the grant of that benefit.

Upon action to sever service connection for PTSD, there will be no entitlement to service connected disability or benefits under 38 USC chapter 35.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional

information regarding applicable laws and regulations, please consult your local library, or visit us at our web site, www.va.gov.

Rating Decision

Department of Veterans Affairs Page 1
VA REGIONAL OFFICE 08/16/2004

NAME OF VETERAN
Keith A. Roberts

VA FILE NUMBER
28 353 461

SOCIAL SECURITY NR
[REDACTED] -7979

POA

COPY TO
File
VSCM

ACTIVE DUTY			
EOD	RAD	BRANCH	CHARACTER OF DISCHARGE
03/22/1968	12/23/1971	Navy	Honorable

LEGACY CODES			
ADD'L SVC CODE	COMBAT CODE	SPECIAL PROV CDE	FUTURE EXAM DATE
	1		None

JURISDICTION: Medical or Other Evidence Received 07/20/2004

SUBJECT TO COMPENSATION (1.SC)

9411 POST TRAUMATIC STRESS DISORDER WITH DEPRESSION/DYSTHYMIA COMPETENT [PTSD/Medical/Veteran Evidence] Service Connected, Vietnam Era, Incurred
100% from 07/16/1992

COMBINED EVALUATION FOR COMPENSATION

100% FROM 07/16/1992

NOT SERVICE CONNECTED/NOT SUBJECT TO COMPENSATION (8.NSC Vietnam Era)

5257 RESIDUALS, RIGHT KNEE INJURY, NOT SHOWN Not Service Connected, Not Incurred/Caused by Service
0%

6099-6079 EYE/VISION CONDITION, TO INCLUDE AS SECONDARY TO PTSD Not Service Connected, Not Secondary
0%

6100 BILATERAL HEARING LOSS, NOT SHOWN Not Service Connected, Not Incurred/Caused by Service
0%

6354 FATIGUE, TO INCLUDE AS SECONDARY TO PTSD Not Service Connected, Not Secondary
0%

6603	RESTRICTIVE PULMONARY IMPAIRMENT WITH HISTORY OF PULMONARY EMBOLI (ALSO CLAIMED AS COPD), CLAIMED SECONDARY TO PTSD Not Service Connected, Not Incurred/Caused by Service 10%
6899	TOBACCO ABUSE, CLAIMED SECONDARY TO PTSD Not Service Connected, Not Incurred/Caused by Service 0%
7005	CORONARY ARTERY DISEASE, STATUS POST MYOCARDIAL INFARCTION, WITH ANGINA (ALSO CLAIMED AS ARTERY DISEASE), CLAIMED SECONDARY TO PTSD Not Service Connected, Not Incurred/Caused by Service 30%
7399-7304	GASTROINTESTINAL DISORDER, CLAIMED SECONDARY TO PTSD Not Service Connected, Not Incurred/Caused by Service 0%
7522	ERECTILE DYSFUNCTION, TO INCLUDE AS SECONDARY TO PTSD Not Service Connected, Not Secondary 0%

7999-7903 OBESITY, TO INCLUDE AS SECONDARY TO PTSD Not Service Connected, Not Secondary
0%

9399-9326 ALCOHOL ABUSE, CLAIMED SECONDARY TO PTSD Not Service Connected, Not Incurred/Caused by Service
0%

9499 MIXED PERSONALITY DISORDER, CLAIMED SECONDARY TO PTSD Not Service Connected, Not Incurred/Caused by Service
0%

PENSION ENTITLEMENT DECISIONS (2 PT, 9 NOT PT, 11A, and 11B)

Permanent and Total for NSC from 11/14/1990

DISABILITIES CONSIDERED FOR PENSION PURPOSES ONLY

5295 DEGENERATIVE JOINT DISEASE, LUMBOSACRAL SPINE Pension, Vietnam Era
20%

5024 OLECRANON SPUR, RIGHT, WITH HISTORY OF TENNIS ELBOW Pension, Vietnam Era
0%

5299-5227 RESIDUALS OF RIGHT FIFTH METACARPAL FRACTURE Pension, Vietnam Era
0%

COMBINED EVALUATION FOR PENSION: 100%

ANCILLARY DECISIONS

Basic Eligibility under 38 USC Ch 35 from 04/27/1999

I hereby certify that the claims record of this veteran has been reviewed, and a finding of fraud has been properly identified. The above rating is consistent with the provisions of 38 CFR 3.901.

/s/ _____ 8/17/04 _____
R.Granstrom, VSCM Date

/s/ _____
B. Nehls, AVSCM

APPENDIX L

The American Legion
For God and County

WASHINGTON OFFICE * 1608 "K" STREET, N.M. * WASHINGTON, DC 20006-2847 * (202) 861-2700 * FAX (202) 861-2728

October 15, 2004

Renee Szybala (21)
Director
Compensation and Pension Service
810 Vermont Ave., NW
Washington, DC 20420

RE: Roberts, Keith A.
C 28 353 461

Dear Ms. Szybala:

On August 16, 2004, the Milwaukee Regional Office (RO) proposed the termination of the veteran's service connected compensation benefits for Post Traumatic Stress Disorder (PTSD), including entitlement under Ch. 35, because the RO determined that the veteran supported his claim with fraudulent statements. The American Legion believes the evidence does not support such action and we formally request an administrative review of this case. We further insist that any action to implement the rating decision of

August 16, 2004 be deferred pending the outcome of a complete review of the evidence of record by the Compensation and Pension Service (C&P).

The Rating Decision of August 16th lists as "Evidence" in support of the proposed severance the July 8, 2004 investigation report by the VA Office of the Inspector General (VAOIG). Citing from this report, the rating decision concurs with the VAOIG's determination that the veteran's statements regarding the circumstances surrounding the death of Gary Holland during military service were fraudulent. We would, however, note that the enclosed official copy of the C-file provided directly to The American Legion by the RO on September 16, 2004, does not contain the cited VAOIG report. Obviously the VAOIG report constitutes evidence crucial to this issue and it should have been, but was not for some unknown reason, incorporated into the C-file. Therefore, in order for the veteran and The American Legion, as the veteran's accredited representative, to contest the proposed termination, this evidence needs to be made available. If there is a law or regulation that authorizes VA to withhold this evidence from the veteran and his power of attorney, please provide The American Legion with an explanation. In our view, without the opportunity to review and challenge the underlying evidence developed by the VAOIG, the proposed severance is, at the best, premature and, at worst, clearly erroneous.

Service connection far PTSD was granted in 1998 with an effective date of August 1993. This was based on extensive medical evidence and opinion that links the veteran's current PTSD to in-service experiences, including but not limited to the death of Gary Holland.

For reasons not apparent from the copy of the C-file, following the veteran's calls to the VAOIG in December 2003, some question arose concerning the veteran's credibility and veracity. The VAOIG concluded that the veteran's statements concerning Mr. Holland's death were patently false, based on statements from several former members of the veteran's unit. However, the August 16th rating decision did not cite to any official Naval record(s) that would contradict the veteran's version of the February 4, 1969 accident.

In the view of The American Legion, the VAOIG's determination of fraud appears to be more conjectural rather than factual, because it is based on the recollection of people about an event that took place in February 1969, over 35 years ago. While the VAOIG's report may bring the veteran's statements into question, the cited evidence does not, in our opinion, rise to [or meet] the legal standard for proof of fraud. (In the context of veterans benefits, fraud is generally defined as a statement from the claimant where the claimant knows or has reason to know that the claim or statement is false, fictitious, or fraudulent; or the claimant acts in deliberate ignorance of the truth or falsity of the claim or statement; or the claimant acts in reckless disregard of the truth or falsity of the claim or statement. *See 38 C.F.R. § 42.2*). In the absence of required conclusive evidence, the veteran is entitled to the benefit of doubt, under 38 CFR 3.102, and service connection for PTSD should be maintained.

The veteran's Service Medical Records note more than one event in service that was traumatic or stressful. The fact that now the RO does not accept one of the events as true does not mean that the veteran

suffered no stressful or traumatic event in service that could be linked to his current diagnosis of PTSD. Moreover, in concurring with the VAOIG determination and proposing to sever service connection, the RO has made an impermissible medical judgment regarding the diagnosis of PTSD and the in-service stressors. The regional office clearly failed to consider the fact that this diagnosis has been repeatedly confirmed by both VA and private psychiatrists and has been based on their reviews of the veteran's complete service records and post-service medical history. At the very least, the RO should have sought appropriate guidance from the C&P Service or the VA General Counsel before taking the drastic step of proposing severance of service connection and related benefits.

If, upon a complete review of the C-file and the cited VAOIG investigation report, C&P affirms the proposed severance, The American Legion requests, on behalf of the veteran, that this letter be accepted as a supplemental Notice of Disagreement.

However, if upon review, C&P agrees that the proposal to sever was improper, then The American Legion requests a further administrative review of the RO's continued denial of the veteran's claim of entitlement to an earlier effective date of claim for PTSD and entitlement to service connection for a heart condition, COPD, erectile dysfunction, right elbow, right knee, back condition, and hearing loss.

With further regard to the Rating Decision of August 16, 2004 and given the fact that fraud is a very serious charge, we believe it is of interest to consider the somewhat usual circumstances by which the

veteran's longstanding grant of service connection came under the scrutiny of the VAOIG and how/why the question of fraud arose.

By way of background, in March of 2002, the veteran reopened his claim seeking entitlement to an earlier effective date for the service connected PTSD and secondary service connection for his heart and other conditions. Even though additional medical evidence was submitted, no VA exams were conducted. Personal hearings were held and numerous pieces of correspondence sent by the veteran to various VA officials and Members of Congress questioning the actions and decisions of the Milwaukee Regional Office. In February 2003, the additional claims were denied and a NOD timely submitted. In May 2003, the claim for an earlier effective date of February 27, 1987 for PTSD based on an informal claim was denied. Subsequently, another personal hearing was held and a VA psychiatric examination was conducted. In May 2003, the claim for an earlier effective was again denied and the veteran continued his long running disagreement with numerous written statements and submissions. Another hearing was held in September 2003 and a SSOC issued on December 1, 2003.

According to Mr. Roberts, upon receipt of this SSOC, he became very upset and phoned the VAOIG's office on two occasions complaining about delays and errors in the way his case was being handled by the VARO, including gaps in testimony in the transcript of the September 2003 personal hearing, and possible bias against his case by some of the adjudication staff at the Milwaukee VARO who had been involved with his claims over the years.

On December 10, 2003, according to a letter in the file to Congressman Lane Evans, the C-file was transferred to the VAOIG for review,. Over the next eight months, what had originally been a complaint about the RO turned one hundred and eighty degrees and became a fraud investigation of the veteran culminating the proposal to take away his VA benefits. (According to the VAOIG, on July 8, 2004, the case was, in fact, referred to the U.S. Attorney, but, for some reason, no legal action has been taken against the veteran.) The veteran believes the VAOIG's investigation has been an attempt to harass and punish him for his oft-repeated challenges to the continued denial of his claims for additional service connected disability benefits.

According to the Rating Decision of August 16, 2004, the RO determined that the veteran's statements in the various treatment records from the North Chicago VAMC and the VA PTSD exam in March 1998 regarding the circumstances of Gary Holland's death were fraudulent. The rating refers to the VAOIG's interviews with an unspecified, but apparently small number of the approximately 50 or more former members of the veteran's air wing. While reference is made to the VAOIG having also obtained certain "military records", these records were not otherwise identified nor is it indicated exactly what contradictory information they may have contained. The rating decision merely states that these "military records", together with the personal statements obtained, fail to corroborate the veteran's statements about his presence at the incident in question or any relationship with Mr. Holland.

Concerning the veteran's long running efforts to support his claim for service connection for PTSD, it should be noted that, on March 8, 1995, the veteran wrote to the RO requesting that action be taken to obtain: Copies of the Plan of the Day for January 1969; Copies of the unit's Log Book for January 1969; and Copies of all aircraft accident reports at USNAF Naples in 1969. He felt these records would be dispositive in his claim for PTSD. We would call your attention to the fact that the C-file contains a Rating Decision form, dated March 21, 1995, indicating the veteran was to be advised to submit VAF 9 and that his March 8 and 10, 1995 were being accepted as an interim substantive appeal. This form also indicates that his request for Naval records was to be referred to the Department of the Navy for response. However, there is no subsequent correspondence or indication in the C-file showing that this was ever done. It would appear the current issue would be moot had the RO undertaken development of these Naval records in 1995.

It should also be noted that, on October 24, 1997, as part of his continuing effort to support his claim, the veteran submitted a copy of Gary Holland's Navy Death Certificate as well as a copy of the accident report, which has been obtained for him by his congressman. With this evidence and the several concurring diagnosis of PTSD with dysthymia and depression, the Rating Decision of May 19, 1998 determined that Holland's death was a valid stressor for the veteran and granted service connection. The Rating Decision did not discuss the other medical evidence or any other stressor used by the medical examiners in making this diagnosis.

With further regard to official records relating to Gary Holland's death, Mr. Roberts indicates that within a short time after the accident, there were two Navy photographers taking pictures of the scene, including personnel present. These photos may or may not be part of one the official accident reports or they may be stored elsewhere. As stated earlier, it is unclear what Naval records were, in fact, obtained by the VAOIG.

In conclusion, at this point, The American Legion believes the regional office has acted in a premature, arbitrary, and improper manner. To ensure the veteran receives full due process and all of the benefits to which he is legally entitled, intervention by C&P is required. Please keep this office advised of the outcome of the requested review.

Sincerely,

/s/
Philip R. Wilkerson
Dep. Mgr. For Ops. & Trg.
National VA&R Commission

Enclosures
Cc: Keith Roberts
Vernon Miller
Ronald Abrams

APPENDIX M

November 22, 2004

The Honorable Anthony J. Principi
Secretary Veterans Administration
Washington, DC 20240

RE: C 28 353 461

Dear Secretary Principi:

Pursuant to the Due Process Clauses in the 5th Amendment of the United States Constitution, VA's August 16, 2004 Rating Decision and VA's November 10, 2004 Rating Decision were both required to inform me of the exact Law I have violated for VA to accuse and convict me of fraudulently claiming service connection for PTSD, therefore the VA has violated my right under the fifth amendment of the U.S. Constitution to defend myself.

VA's aforesaid rating decisions have concluded that VA can sever my service connection or any veteran's service connection for PTSD when the Veteran has not verified their presence at, personal involvement in, personal participation in, or first hand experience with their claimed in-service stressor. Yet VA has failed to cite the exact VA Law or VA precedent criteria which requires the Veteran to verify his or her being present at, personally involved in, their personal participation in or their firsthand experience with one of their claimed in-service stressors.

The fact of VA's precedent Rulings of Law is that the Veteran, I am such a person, is not required to corroborate their actual physical proximity to (i.e.: presence at), personal involvement in, personal participation in or first hand experience with any of their reported (i.e.: claimed) in-service stressors. The veteran is only required to by law, to provide "credible supporting evidence that one and only one of their 'reported' (claimed) stressors had actually occurred and that the Veteran was stationed at or assigned to the unit where the reported (claimed) stressor occurred (i.e.: to come into the conscious mind)" see *Pentecost v. Principi* 02, *Souzzi v. Brown* 97, and *Cohen v. Brown* 97.

All VA precedent criteria pertaining to any veterans claim issued are fully probative, relevant and VA shall comply and apply all Precedent Criteria relevant to the Issue of VA's accusations regarding my service connection for PSTD. VA's November 10, 1990 Decision stating that the "excerpt" I provided of *Souzzi v. Brown*, 97 "fails to provide any evidence of probative value" is already violating my Fifth Amendment rights to due process.

The official Military Document of Records obtained by VA in 1997 are in 2004 establishes, and VA has so conceded, that on February 4, 1969 I, Keith A. Roberts, was stationed at and assigned to NAF Naples, Italy and that on February 4, 1969 Gary D. Holland was also stationed at and assigned to NAF Naples, Italy and that on February 4, 1969 a C-54 airplane collapsed her nose wheel trapping and crushing Gary D. Holland in its nose wheel compartment and that on February 5, 1969 Gary D. Holland died due to the injuries he sustained in the traumatic event of February 4, 1969

and therefore by my being stationed at and assigned to NAF Naples Italy on February 4, 1969 and all subsequent days, that the in-service event continued to occur, it is "presumed as a matter of law" that I, Keith A. Roberts had thereby become aware of the February 4, 1969 In-service occurrence (i.e.: to come into the conscious mind) and thereby VA Precedent Criteria in *Cohen v. Brown*, 97 "the adequacy of the (February 4, 1969) stressor shall be presumed as a matter of law" and as such it is fully binding and conclusive upon VA and its systems.

NAF Naples, Italy in 1969 comprised of a force of approximately 300 Naval personnel, of which approximately 200 were enlisted Navy aviation personnel and the majority of those personnel were assigned to various work stations in Hanger # 2, which was the only hanger at NAF Naples, Italy in 1968, 1969 and 1970. My assigned post in Hanger #2 as of November 1968 and on February 4, 1969 was with the Transient Line Operations Division, whose sole duty is to direct and control all ground aircraft movements and accidents, in fact, the Transient Line Operations Linemen, such as I was, are the only Navy personnel authorized by Navy Aviation Regulations to direct and control ground aircraft movements and accidents under their control (i.e.: transient and stationed Military Aircraft).

VA's contention, as of November 10, 2004, that "there is no documented evidence (supportive of) of any of the claimed "reported" (i.e.: claimed) traumas and that "It is quite clear that the basis for the PTSD diagnosis was the 'alleged' observation of the death of your 'friend', are both a medical determination of which VA adjudicators are not permitted by law to

provide and said contentions are quire inaccurate and false when one actually reads (i.e.: reviews) my records.

Pursuant to VA Law and Regulations the written expert medical opinions submitted in March 2003 and April 2003 from Forensic Psychologist and Federally Registered Expert Medical Witness Dr. Donald B. Derozier, PhD regarding his review of my records are fully probative and relevant in substantiating my service connected claims for service connected psychiatric disorders to include a DSM II Anxiety Disorder and PTSD and others.

In VA's October 5, 2004 letter to VAMC, VARO provided VA's determination that the probative evidence of record from Dr. Derozler provides that by Dr. Derozier's review, in March and April 2003 of my service medical records, he has determined that just my service medical records containing the entries of 13 Dec 69 and 15 Dec 69 recording and reporting my 2 nights and 1 ½ days psychiatric hospitalization subsequent to the Assault upon my person by Navy Shore Patrol on 13 Dec 69 does in fact provide the medical evidence that "to a reasonable degree of psychological probability Mr. Roberts experienced a psychiatric condition that could have been or might have been diagnosed as PTSD had such a diagnosis been extant and customary while he was in active duty prior to his discharge, therefore Dr. Derozier Forensic Psychologist and Federally Registered Expert Medical Witness, a specialist of the highest caliber has determined (i.e.: diagnoses) that the 13 Dec. 69 and 15 Dec. 69 record in my service medical records is establishing I had experienced an in-service event and is providing a diagnosis of chronic PTSD while I was

in-service that could have been provided by using the DSM II criteria extant then for PTSD an Anxiety Disorder and that Dr. Derozier himself had provided a DSM IV diagnosis of PTSD based solely upon my "reported" as of May 1972 In-service Stressor event, I definitely experienced, of 13 Dec 69 and 15 Dec 69 recorded there in my service medical records.

Therefore, as of October 5, 2004 VA has effectively and legally conceded (i.e.: admitted), on record that my service medical records do in fact provide a valid claim for service connected psychiatric disabilities to include, 1972, a DSM II Anxiety Disorder and in February 1987 PTSD.

On December 10, 1990 during my still pending VA February 27, 1987 claims VARO received my private psychiatric records dated November 1, 1989 to October 11, 1990 and in the November 1, 1989 records my private psychiatrist provided his notion "Navy – 1 night psych" said notation is clearly referring to my "military life" in the Navy. As of VA's October 5, 2004 letter to VAMC, VA has conceded that said notation in my said private psychiatric records establishes that "He reported (i.e.: claimed) one night of psychiatric treatment while in the Navy" and thereby VA Law and Regulations, as of October 5, 2004 VA has, again, conceded that my service medical records entries of 13 Dec 69 and 15 Dec 69 of my two night and 1 ½ day psychiatric hospitalization in a straight jacket, bed restraints and IM Thorazine (twice) following the personal assault by Navy Shore Patrol on 13 Dec 69 is in fact a claim for service connected PTSD, and that my private psychiatric records of November 1, 1989 contain the notation "Navy – 1 night psych" do thereby provided my second "Well-Grounded Claim" for PTSD

for the verified 13 Dec 69 15 Dec 69 In-service stressor event recorded therein my service medical records and pending before VA ever since my May 1972 VA claim.

VA's March 13, 1991 "SPECIAL" Service Connected Psychiatric examination report contains my third claim for my already claimed and verified 13 Dec 69 and 15 Dec 69 in-service stressor and it also provided the VA examiners diagnosis of said stressor as "this is corroborated (i.e.: verified) in his records and in a report of a brief psychiatric hospitalization" and thereby VA Law and Regulations VA's examiner had obviously referred to my "military life" in the Navy, had diagnosed I had experienced an in-service event, had verified said stressor as being recorded in my records and in "a report of a brief psychiatric hospitalization" obviously in-service, had provided my third "Well-Grounded Claim" for service connected psychiatric disorders to include PTSD based solely upon my verified 13 Dec 69 and 15 Dec 69 stressor recorded in my service medical records and had provided the required "Competent Medical Nexus Evidence" for all my current conditions of records by being plausibly or possibly related to my three "Well-Grounded Claims" for service connected psychiatric disorders to include PTSD and to my verified and claimed in-service stressor event of 13 Dec 69 and 15 Dec 69 recorded therein my service medical records and pending before VA ever since May 1972 VA claims filing.

The VA Law and Regulations quite clearly provides that any Veteran needs only one and only one of those reported (i.e.: Claimed) stressors verified as to having actually occurred and thereby VA Law and Regulations VARO Detroit had received the required

verification of my claimed in-service stressor event for my claimed service connected DSM II Anxiety Disorder not called PTSD as of May 1972 and as of the transfer of my VA C-file to VARO Milwaukee for my February 27, 1987 claims filed upon my initial VA Form 21-526 VARO Milwaukee received my FORMAL verification of my, now as of February 27, 1987 claim for service connected psychiatric disorders to include PTSD and my verified 13 Dec 69 and 15 Dec 69 stressor event.

There was absolutely no legal basis for VARO Milwaukee Adjudicators, in 1991 and still, to continue ignoring the fact of records and VA Law that as of VA's March 13, 1991 "SPECIAL" service connected psychiatric examination conducted per VSCM Douglas Wallin's December 21, 1990 orders as a service connected disabilities examination that I was then fully entitled to service connected compensation for PTSD based solely upon my verified in-service stressor event of 13 Dec 69 and 15 Dec 69. All three VA criteria for granting me service connection for PTSD are, twice on records as of VA's March 13, 1991 "Special" Service Connected Psychiatric Examination, the "medical evidence establishing a current diagnosis of the condition" of PTSD is not required to be written out in language or signs which a non-medical mind can understand, it is only required to be comprehendible by a medical mind certified in diagnosing psychiatric conditions. If a medical mind certified in psychiatry and psychology can find the "medical evidence establishing a current diagnosis of the condition" then VA Law and Federal Law both have Ruled, Held or Ordered that the current diagnosis is of records. Dr. Derozier has testified in writing that my Service Personnel Records, Service Medical Records, Private Psychiatric Records, the VA March 13, 1991 "Special"

service connected psychiatric examination and VA's three mental disorders examinations each provide plausible DSM diagnoses of current PTSD and of PTSD in-service.

VA's March 31, 1998 PTSD examiner had even determined that my private psychiatric records had provided a diagnosis of PTSD as of November 1, 1989 by the notation "Navy" – 1 night psych" when the PTSD examiner had diagnosed "his (my) cardiologist referred him to a psychiatrist who diagnosed him with Major Depression, PTSD and Alcohol Abuse" there in VA's March 31, 1998 PTSD examination report's "Medical and Occupational History" section, and thereby VA Law, Regulations and Expert Medical Minds, VA's March 31, 1998 PTSD examiner had definitely provided a DSM IV diagnosis of PTSD to my verified and claimed, three times, 13 Dec 69 and 15 Dec 69 in-service event and had included it in his Formal DSM IV PTSD diagnosis of my having incurred, developed and began to have PTSD in-service and continuing to suffer from PTSD ever since in-service, therein VA's March 31, 1998 PTSD examination report Axis I section.

For VA or for VA's DRO's to construe that VA's March 31, 1998 PTSD examiner did not include my verified and claimed since May 1972 in-service event in his said DSM IV diagnosis of my having service connected PTSD it would definitely be "pure conjecture" (i.e: guesswork).

VA and VAOIG do not have any "credible supporting evidence" that I committed fraud to obtain service connected for PTSD. VA would be required to obtain official military documentation, not hearsay

evidence, that on February 4, 1969 or thereafter, I, Keith A. Roberts was not stationed at or assigned to NAF Naples, Italy which then could confirm that I did not "to come into the conscious mind" of the February 4, 1969 stressor event. Being that the official military documentation, several of them, establish, beyond any reasonable doubt, that I, Keith A. Roberts, was stationed at and assigned to NAF Naples, Italy on February 4, 1969 "the adequacy of the February 69 stressor is to be presumed as of matter of law" see *Cohen v. Brown* 97.

I am requesting that you intervene and have VA withdraw their August 6, 04 Rating Decision to propose to sever my service connection for PTSD and their November 10, 2004 rating decision that did sever my 100% service connection for PTSD effective August 04, 1993 and provided their new proposal to sever my 100% service connection for PTSD effective as of the earlier effective date of July 16, 1992. I believe this matter can be resolved if it is removed from the jurisdiction of the VARO Milwaukee and be allowed to go to the BVA.

I was at NAF Naples, Italy on February 4, 1969, I was assigned to the Transient Line Operations, and according to the *"Special" Report of Enlisted Performance Evaluation dated 6 Feb 69 and signed by H.R. Truesdale, LCDR, USN I was assigned to the transient line and that my duties were to park, direct and tow assigned and transient aircraft.* I was involved in the accident that caused the death of my friend, Gary D. Holland and I believe that VARO Milwaukee does not have any official military documentation to say I was not there on that day. Hearsay statements

concerning an accident over 35 years old are not official military documentation.

I am requesting that the proposed severance of my benefits for 100% service connected PTDS be stayed through the entire appeal process that I am entitled to. To sever my disability pay at this point in time, would cause a great financial and psychological hardship on my family. The only reason VARO has dreamed up their reasons to sever is because I filed a complaint with the VA Office of Inspector General regarding the behavior of two VARO Milwaukee DRO's. Obviously the VAOIG Investigator is a good friend of the DRO's in Milwaukee and instead of investigating the DRO's action, they have dreamed up this to cause me extreme psychological duress.

My family and I would greatly appreciate any assistance you can give us at this time. Secretary Principi you are the commander and this is happening on your watch.

Respectfully,

/s/ Keith A. Roberts

Keith A. Roberts
P.O. Box 356
Gillett, WI 54124

APPENDIX N

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 05-2425

[Filed August 21, 2006]

KEITH A. ROBERTS,
Appellant,

v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,
Appellee.

BRIEF FOR APPELLANT

Christine M. Cote
Ronald Abrams
National Veterans Legal Services Program
1600 K Street, N.W., Suite 500
Washington, D.C. 20006
(202) 265-8305 Ext. 116

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Respectfully submitted,

/s/
Christine M. Cote

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National Veterans Legal
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(202) 265-8305, extension 116

Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing BRIEF FOR APPELLANT was mailed, first class postage prepaid, to General Counsel (027), Department of Veterans Affairs, 810 Vermont Avenue, N.W., Washington, D.C. 20420-0002, this 21st day of August 2006.

Pursuant to U.S. Vet.App. R. 25(b)(2), I also certify that an original and three (3) true copies of the Brief for Appellant were mailed, first class postage prepaid, on this 21st day of August 2006:

Clerk of the Court
United States Court of Appeals
for Veterans Claims
625 Indiana Avenue, N.W., Suite 900
Washington, D.C. 20004-2950

/s/
CHRISTINE M. COTE

STATEMENT OF THE ISSUES

I. Whether the Board of Veterans' Appeals (BVA or Board) finding of fact that Appellant committed fraud should be reversed?

II. In the alternative, whether the Board of Veterans' Appeals (BVA or Board) conclusion that the grant of service connection for post-traumatic stress disorder (PTSD) with dysthymia and depression was the product of clear and unmistakable error is arbitrary, capricious, and contrary to law?

III. In the alternative, whether the Board's statement of reasons or bases violated 38 U.S.C. § 7104(d)(1) by failing to explain its conclusions that Appellant only raised additional stressors recently and that he "changed his story" that he witnessed the death of his friend Gary Holland in service, in light of clear evidence to the contrary?

IV. Whether the Board's statement of reasons or bases violated 38 U.S.C. § 7104(d)(1) since in finding that severance was proper, the Board relied without adequate explanation on a VA medical opinion that failed to address the positive lay evidence of record and was obtained by a process that did not ensure an impartial opinion?

V. Whether the Board erred in finding that severance of Appellant's service-connected PTSD was proper without the Secretary first obtaining a medical nexus opinion as to whether

Appellant's diagnosis of PTSD, is related to other stressors including the cited December 1969 in-service personal assault, in violation of 38 U.S.C. § 5103(A) and 38 C.F.R. § 3.159(c)(4)?

VI. Whether the Court should vacate that part of the Board's decision denying Appellant's remaining claims because they are inextricably intertwined with the appeal of the determination that severance of PTSD with dysthymia and depression were proper?

STATEMENT OF THE CASE

Appellant, Keith Roberts, appeals the August 26, 2005 decision of the Board of Veterans Appeals that severed service connection for PTSD with dysthymia and depression and which denied or dismissed fourteen other issues. (R. 1-41). Appellant had active service in the United States Navy from March 1968 to December 1971. (R. 45). No psychiatric abnormalities were noted upon enlistment. (R. 47-48). July 1968 service medical records reflect Appellant's complaints that he was "emotionally unstable". He was found to be unable to tolerate discipline and living conditions. (R. 54). December 13, 1969 service medical records reflect that Appellant was "combative and boisterous". (R. 60). He was given thorazine after being placed in a straitjacket and bed restraints. (R. 65).

A March 1991 VA Special Psychiatric Examination report reflected that:

While stationed in Italy, [Appellant] claims to have witnessed the death of a friend in an accident in the airplane hanger where they were

> working. . . . He also reports having been arrested, placed in a straight jacket and restraints by the shore patrol.
>
> The examiner also noted that:
>
> His memory was grossly intact for immediate, recent, and remote material except that he said he could not recall a lot [sic] of detail about his military experience.

(R. 160). Dysthymia with irritability and mixed personality disorder with antisocial and borderline features was diagnosed. (R. 160-61).

In August 1993, Appellant sought service connection for acute personality disorder and reported that the condition began on December 13, 1969. (R. 270). In a February 1994 statement, Appellant detailed the death of his friend, Gary Holland, in service while he was making repairs to a C54 airplane. He reported that he assisted in rescue attempts and was placed under arrest for his efforts. (R. 282-83). Service personnel records described the death of Gary Howard, reporting "[t]his active duty AN/USN reportedly was crushed between the nose and front wheel of an airplane on the afternoon of 4 February 1969." (R. 371). Service records reflect that Holland was killed in the accident. (R. 372).

Appellant was afforded a VA examination for PTSD in March 1998. The examiner reported that Appellant witnessed the death of Gary Holland in service. PTSD and major depressive disorder were diagnosed at that time. (R. 377). Service connection for PTSD was granted in May 1998, **effective in 1992.** A 50%

disability rating was assigned. (R. 383-87). The rating decision indicated that:

> [t]he veteran has reported that he witnessed the death of a fellow service person, Gary Holland, in which the nose of the aircraft collapsed and killed Mr. Holland. The veteran has supplied a copy of Mr. Holland's death certificate which shows he died of cerebral anoxia due to a crush injury of the chest. The veteran's reported stressor is, therefore, considered to be corroborated.

(R. 383). PTSD was also diagnosed in an April 1999 VA examination report. (R. 394-98). His disability rating for service connection was increased to 100% in a May 1999 rating decision, effective in August 1993. (R. 403-407).

In October 2002 correspondence, VA psychiatrist, Chandra Bommakanti, M.D., reported that Appellant's "Post Traumatic Stress Disorder is from the traumatic event you were exposed to in Italy. . . . Also, in my opinion, PTSD influenced your depression, alcoholism and personality disorder." (R. 449). In a March 2003 private psychiatric report, the psychiatrist reported that the death of Gary Holland "under traumatic circumstances, subsequent maladjustment and psychological symptom appearances...could reasonably have made a posttraumatic stress disorder diagnosis." (R. 904-907, 906). In an April 2003 statement, Appellant cited to the March 1991 psychiatric examination report that reiterated two major in-service stressors. He wrote:

> The examiner (Dr. Hastings) noted this veteran's later verified in-service stressor in such detail as to time, place and resulting death of this veteran's friend, which developed in February, 1969, the examiner also makes note of a December 1969 incident in which this veteran had fought with Naval Shore Patrol and was placed in a psychiatric hospital with a straight jacket with bed restraint and injected with thorazine for two days, the examiner further makes note of this veteran's psychiatric evaluation in January 1970 in regards to the December 69 [sic] incident and the fact that the[] hospitalization and psychiatric evaluation are confirmed in this veteran's service medical records.

(R. 393). An April 2003 private psychiatric report and supplemental report provided that, "[m]edical records at the time of his arrest, secondary to assault in December, 1969, with treatment in January 1970, are quite sparse." (R. 947). Describing a July 1992 VA communication, the psychiatrist wrote, "The 1969/1970 assault and psychiatric consultation was not mentioned in the context of [] PTSD, and therefore perceived as not relevant." (Id). He offered, "It is also my opinion that [] subsequent psychological problems were possibly related to the traumatic loss of his friend ***and subsequent associated events***." (R. 948, 1225-1231)(emphasis added).

Appellant also describes two in-service stressor events in a September 2003 VA RO hearing. He testified:

> Even a lay person can determine that this man, me, went through some kind of something, that caused him to react so psychotically, that they had to put the man in a strait jacket, and place him in [] bed restraints, and shoot him up with Thorazine that is normally only used in extreme psychotic disorders.... Prior to the incident, which has been verified and which I am diagnosed as having PTSD for one of the things, one of the stressors, one of the in-service events only two of my in-service events were known by Regional Office [sic] and until the last few months they were the only two that were known by me.

(R. 1187). In a December 2003 letter from VA to Congressman Lane Evans, the agency reported:

> Mr. Roberts' VA claims folder was forwarded to the VA Office of the Inspector General (OIG) on December 12, 2003. The OIG took this action in reply to an inquiry from Mr. Roberts. After his claims folder is returned to our office, a member of our Appeals Team will review his request for a fourth hearing.

(R. 1272). In a December 2003 letter from the OIG to the Commander of the Naval Safety Center, Special Agent Ray Vasil indicated:

> I am conducting an investigation of the claims of a U.S. Navy veteran who is claiming non-combat PTSD. The veteran claims that he witnessed his "good friend" killed in an accident at the U.S. Naval Air Facility, Naples, Italy. The veteran claims he pulled his friend, Gary

> Doyle HOLLAND from the accident site and this incident has created stress in his life that he is currently unable to work or relate to others.

(R. 2112). Statements provided by available veterans who alleged to have witnessed the death of Gary Holland were taken by Special Agent Vasil of the OIG. The statements indicated that the available veterans were unable to recall Appellant's presence at the scene of the in-service accident, thirty-five years earlier *(See* R. 1617-1627). In a February 2004 statement, Veteran William W. Stewart reported that Appellant worked on the other side of the hangar as an aviation machinist mate at the time of the accident. (R. 2215). In a February 2004 statement also taken in conjunction with the OIG undertaking, Veteran Martin Sunglao reported that he was "close personal friends" with Holland, after having known him for two months at the time of Holland's fatal accident, and that "he and Holland never associated with ROBERTS...." (R. 2219).

An August 2004 rating decision proposed to sever service connection. (R. 1328). The RO reported that the OIG conducted an investigation of "your reported inservice stressor", the death of Gary Holland, and deemed his testimony fraudulent because: 1) although he was stationed at the same facility, he was not found to have been present at the site or time of Holland's death; and 2) he was not found to have participated in rescue attempts. (R. 1331). Appellant filed a notice of disagreement with this determination. (R. 1352).

In an internal VA Compensation and Pension Exam inquiry dated in October 2004, an independent medical review was requested to determine whether a mental

health disability had its onset during service or was aggravated by service. (R. 1366). The inquiry stated:

> The following facts are established by the evidence of record and should be considered by the opining psychiatrist:
>
> 1) The diagnosis of PTSD is not acceptable for VA rating purposes as it is based on a stressor determined to be fraudulent.
> 2) The earliest record of psychiatric treatment following military discharge is documented in 02/87 following the veteran's MI in 01/87.
> 3) The first report of inservice trauma is documented in the Milwaukee VAMC Mental Health exam dated 03/13/91. Previous treatment records note various other stressors dealing with financial and family problems.
> 4) The veteran reported treatment in 1980 by Daniel B. Nicholas, Ph.D. In response to our request for treatment records, Dr. Nicholas advised that he had no record of having treated the veteran.
> 5) The veteran reported treatment by Martin Yani, Ph.D. from 1978-1979. He could not provide an address, and we were unable to locate Dr. Yanis or obtain those treatment records.
> 6) The veteran's report of a history of bipolar disorder is not confirmed by any treatment records.
> 7) The evidence in its entirety contains many discrepancies in testimony by the veteran, in particular regarding employment and health, to include his reports of being terminally ill.
> 10) It is found that the medical opinions of record are based in part on fraudulent testimony

and/or unreliable history provided by the veteran.

11) We are unable to provide you with a copy of the OIG report as it can only be released through the Office of the Inspector General.

(R. 1366-67). In November 2004 correspondence, Appellant reported:

> NAF Naples, Italy, in 1969, [was] comprised of a force of approximately 300 Naval personnel, of which approximately 200 were enlisted Navy aviation personnel and the majority of those personnel were assigned to various work stations in Hanger #2, which was the only hangar at NAF, Naples, Italy in 1968, 1969 and 1970. My assigned post in hangar #2 as of November 1968 and on February 4, 1969 was with the Transient Line Operations Division, whose sole duty is to direct and control all ground aircraft movements and accidents, in fact, the Transient Line Operations Linemen, such as I was, are the only Navy personnel authorized by Navy Aviation Regulations to direct and control ground aircraft movements and accidents under their control....

(R. 1493). He also reiterated that his in-service stressors included the December 1969 personal assault. (R. 1494-1495). Finally, in that same letter he stated:

> **I was at NAF Naples, Italy on February 4, 1969, I was assigned to the Transient Line Operations, and according to the "Special" Report of Enlisted Performance**

> **Evaluation dated 6 Feb 69 and signed by H.R. Truesdale, LCDR, USN I was assigned to the transient line and that my duties were to park, direct and tow assigned and transient aircraft. I was involved in the accident that caused the death of my friend, Gary D. Holland and I believe that VARO Milwaukee does not have any official military documentation to say that I was not there on that day.**

(R. 1497)(emphasis added).

In the November 2004 C&P examination scheduled in response to the issuance of the October 2004 inquiry, the examiner wrote:

> The primary traumas reported by the veteran, which are clearly documented in the claims file folder in a number of places, include an incident where he witnessed a supposed friend of his being killed; the next incident was when he was on a line crew flight and there was a landing gear problem and there was a hard landing; however, there were no injuries. In another incident, there was a nose wheel problem when he was on a flight, and, again, the plane almost crashed, but there was no injury to anyone involved. The final trauma he reported experiencing in the military was being forced to watch a video in which there was an explosion on a US naval ship and he was asked to give the opinion of causation. Having to watch this video apparently was reportedly traumatic for the veteran. In reviewing these traumas with the note that the inspector general's office had

> investigated the incident which had originally caused service connection for the veteran, it is quite clear that the veteran had not experienced trauma which would be sufficient to cause post-traumatic stress disorder. It is quite clear that the basis for his post-traumatic stress disorder was based upon his alleged observation of the death of his supposed "friend." *Additionally there was no documented evidence of the other reported traumas.*

(R. 1501)(emphasis added). The examiner diagnosed dysthymia, chronic and severe, and mixed personality disorder, finding that, "his report of trauma does appear to be fraudulent, according to the IG, and therefore his symptoms would not be consistent with a diagnosis of PTSD." (R. 1502). Service connection was severed in November 2004. (*See* R. 1505-1513, 1557-1566).

In an internal VA February 2005 C&P examination report inquiry, an examination and medical opinion by Board of Psychiatrists (at least 2) was requested. (R. 1583). In this inquiry, the examiners were also properly instructed to consider the physical assault stressor in December 1969 (*See* R. 1583-84). One week later, however, Appellant reported that "another examination would serve no useful purpose because the VA already has enough evidence on file to make a favorable decision in his case." (R. 1578).

In a May 2005 private psychiatric report, Elaine M. Tripi, Ph.D., CRC[1], diplomate of the American

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[1] Certified Rehabilitation Counselor.

Academy of Experts in Traumatic Stress, outlined that she had reviewed all available records including Appellant's claims file and records pertaining to severance proceedings. (R. 2264-2270). Noting "the incident pertaining to Mr. Holland" and that Appellant "has also claimed other incidences that were traumatic for him", Dr. Tripi concluded that "it is more likely than not, that Mr. Roberts' Post Traumatic Stress Disorder is a direct result of his military experience." (R. 2270).

Appellant was afforded a BVA hearing in June 2005. (R. 2285-2329). During the hearing, Appellant testified that he claimed stressors including the "assault by the shore patrol and then the subsequent resulting two-night psychiatric hospitalization in a straightjacket [sic], bed restraints." (R. 2293). Appellant's representative indicated, "That's our whole argument regarding the improper severance was that that stressor [personal assault/straitjacket] hasn't been . . . addressed by a VA examiner to support the diagnosis of PTSD." (R. 2292). In discussing the February 1969 stressor, the death of Gary Holland, Appellant testified:

> **I was a lineman. I was an E3 at the time [of the accident]. I was left in charge of the line operation shack when this accident happened in February of '69. Although I'm being told not to dwell on it, the point is, it's still a stressor and they're defaming my service and they're degrading the hell out of that stressor.**

(R. 2314) (emphasis added).

In its August 26, 2005 decision, the BVA continued the severance of service connection for PTSD. (R. 1-42). The Board also denied 14 claims arising out of the award of service connection for PTSD. In its decision, the Board made a finding of fact that appellant's service-connected PTSD had been in effect for more than ten years, and that "[t]he veteran made intentional misrepresentations of fact for the purpose of obtaining or retaining VA benefits, with knowledge that the misrepresentations may result in the erroneous award or retention of such benefits." (R. 5). The Board made several additional findings of fact, including:

> 3. At the time the RO granted service connection for PTSD. . . in a May 1998 rating decision, it had not verified that there was credible supporting evidence that the veteran's claimed in-service stressor event actually occurred.
>
> 5. But for the errors in the May 1998 rating decision, service connection for PTSD...would not have been granted.

(R. 5-6). Referring to the May 1998 rating decision granted service connection for PTSD, the decision indicated:

> the RO recited the veteran's claimed, and unverified, stressor or witnessing the death of fellow service person Gary H. The RO noted that the veteran supplied a copy of [G]ary H.'s death certificate, which showed that he died due to a crush injury of the chest. ... Crucially, however, the claimed stressor was not simply

> that Gary H. died, but that the veteran personally participated in a rescue attempt and in subsequent efforts to extricate Gary H.'s body from the nose wheel of the aircraft, and [m]oreover, that he was a close personal friend of Gary H.

(R. 25). The decision concludes that there was CUE in the May 1998 rating decision for three reasons. First, the Board found that that the was CUE because, "[h]ad the RO obtained supporting evidence, as it was required to do by law, it is clear that service connection would not have been granted." (*Id*). Second, the decision found that there was CUE in the May 1998 rating decision, because "the correct facts with respect to the veteran's stressor were known by the veteran, but were not before the adjudicator. ... [S]uch error is undebatable and is of the sort which, had it not been made, would have manifestly changed the outcome of the May 1998 rating decision. (R. 26). Finally, the Board found CUE based upon a change in diagnosis citing the November 2004 VA medical opinion that "since the veteran was not present during this incident, there does not appear to be any basis for his claim of post-traumatic stress disorder." The decision found that the opinion satisfied "38 C.F.R. § 3.105(d) in providing certification that, in light of all accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous." (R. 27).

The Board decision concluded that March 1998 rating decision was:

> based primarily on the diagnosis of a March 1998 VA examiner, which mentioned only the

> stressor related to the death of Gary H. as the basis of the PTSD diagnosis. It cannot therefore be argued that service connection for PTSD with dysthyrnia and depression was based on any additional stressors not known or discussed by the RO or the VA examiner.

(R. 28). Noting testimony presented during the June 2005 hearing, the Board decision held that Appellant recanted his testimony that he witnessed Gary Holland's death indicating that, "the veteran stated that, because he did not need to witness Gary H.'s death and that he need only prove that he was stationed at the same base where the incident occurred. The veteran based this contention on . . . *Suozzi v. Brown,* 10 Vet.App. 307 (1997) and *Pentecost v. Principi,* 16 Vet.App. 124 (2002)." (R. 21). This decision is the subject of the current appeal.

SUMMARY OF THE ARGUMENT

The Board's finding of fact that Appellant committed fraud should be reversed because the record does not support the conclusion that Appellant made intentional misrepresentations of fact relating to the death of his friend in service. In the alternative, the Board's conclusion that the grant of service connection for PTSD with dysthpmia and depression was the product of clear and unmistakable error is arbitrary, capricious, and contrary to law, for several independent reasons. First, the grant of service connection cannot undebatably be wrong given the May 2005 diagnosis of PTSD, after consideration of all of the evidence of record. Second, the grant of service connection cannot undebatably be wrong because Appellant's PTSD diagnosis could be supported even

without being able to verify Appellant's participation in rescue attempts. Third, the grant of service connection cannot undebtably be wrong because Appellant's PTSD diagnosis could be supported based upon the December 1969 stressor, personal assault by shore patrol involving straitjacketing and thorazine injections, alone. Thus, VA has not, met its severance burden.

In the alternative, the Board failed to explain its conclusions that the December 1969 stressor was raised after severance proceedings began and that Appellant had recanted his testimony that he had witnessed the death of his friend, Gary Holland, in service. The evidence of record contradicts the Board's findings. The Board's statement of reasons or bases is also inadequate since the Board relied without adequate explanation on a VA examination that failed to address all of the favorable evidence of record, namely evidence that other diagnoses were based upon stressors including the December 1969 personal assault stressor, and the May 2005 diagnosis of PTSD, which considered all cited stressors and considered documents relating to severance proceedings. Accordingly, the Board violated 38 U.S.C. § 7104(d)(1) as interpreted in the Court's decision in *Gabrielson v. Brown*, 7 Vet.App. 36 (1994).

The Board also violated 38 U.S.C. § 7104(d)(1) by relying without adequate explanation on a VA medical opinion that was not obtained in an impartial, unbiased, and neutral manner. Specifically, an October 2004 internal VA C&P examination inquiry prevented the examiner from considering the death of Gary Holland as a stressor, or from considering other

stressors, in determining whether Appellant currently suffered from PTSD related to service.

Next, the Secretary failed to ensure that Appellant was afforded a medical opinion addressing whether his PTSD disability was due to any cited stressors including his observance of the death of Holland or the December 1969 in-service personal assault, pursuant to 38 U.S.C. § 5103A. Finally, the Court should vacate that part of the Board's decision denying Appellant's remaining claims because they are inextricably intertwined with the appeal of the determination that severance of PTSD with dysthymia and depression were proper.

ARGUMENT I. THE BOARD'S FINDING OF FACT THAT APPELLANT COMMITTED FRAUD SHOULD BE REVERSED.

A. RELEVANT LAW

The Court reviews BVA fact finding under a "clearly erroneous" standard of review. Under this standard of review, the Court may "hold unlawful and set aside [a finding of material fact made by the BVA in reaching a decision] . . . if the finding is clearly erroneous." 38 U.S.C. § 7261(a)(4). A finding is "'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gilbert v. Dewinski,* 1 Vet. App. 49, 52 (1990) (quoting *Anderson v. City of Bessemer City,* 470 U.S. 564, 573-74 (1985)). This "clearly erroneous" analysis applies to the Board's finding as to whether the evidence on a particular issue of fact was in equipoise, and such a finding may be clearly

erroneous even if there is contradictory evidence on the issue of fact. *See Mariano v. Principi*, 17 Vet-App. 305, 313 (2003) (holding that "the Secretary's application of the section 5107(b) equipoise standard in reaching [a] factual determination was clearly erroneous . . . and will set it aside"); *Padgett v. Nicholson*, 19 Vet.App. 133, 146-47, 151 (2005) (en banc) (holding), *withdrawn on other grounds*, 19 Vet. App. 334 (2005).

If a rating level or benefit has been continuously in effect for a certain length of time, it may be protected by law from severance. As in this case of a veteran with ten years of continuous receipt of service-connected disability (August 1992 effective date), VA cannot sever benefits unless there was fraud involved in obtaining the rating, where there has been no challenge to the length or character of his service. 38 C.F.R. § 3.957.

Fraud is the intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining or retaining VA benefits, with knowledge that the misrepresentation or failure to disclose may result in the erroneous award or retention of such benefits. 38 U.S.C. § 110; 38 C.F.R. § 3.1.

B. The Appellant Did Not Commit Fraud, and the Board's Finding to the Contrary Should Be Reversed.

Relying on Appellant's February 1994 statement regarding the incident, the Board determined that Appellant's award of service connection was properly severed because he made intentional

misrepresentations of fact relating to the February 1969 accident. (R. 5). As will be described below (in part II, *infra*), his testimony relating to the death of Gary Holland has not been inconsistent. Even assuming, without conceding, that there may be inconsistencies or exaggerations in appellant's February 1994 statement, it is significant that when appellant made this statement, he was rated 100 percent disabled from his service-connected PTSD, which was in effect since August 1993.

Using the criteria in effect at the time, a 100% rating for psychoneurotic disorders contemplates that:

> The attitudes of all contact except the most intimate are so adversely affected as to result in virtual isolation in the community, total incapacitating psychoneurotic symptoms bordering on gross repudiation of reality with disturbed thought or behavioral processes associated with almost all daily activities such as fantasy, confusion, panic and explosions of aggressive energy resulting in profound retreat from mature behavior.

38 C.F.R. § 4.132, Diagnostic Code 9411 (1993). Thus, based upon these criteria, including "gross repudiation of reality," "fantasy," and "confusion," it is clear that Appellant could not have formed the requisite *mens rea* to make an intentional misrepresentation of fact. As such, the Board's finding that intentional misrepresentations were made is directly contradicted by the evidence of record. Accordingly, the Board's finding that severance of service connection for PTSD with dysthymia and depression was proper based upon fraud cannot stand, and reversal of the Board's finding

is warranted.[2] Because it was impermissible for VA to sever benefits without the requisite basis in the record for a finding of fraud, the proper remedy is for Appellant's benefits to be reinstated.

In the alternative, at the very least, the Board violated 38 U.S.C. 7104(d)(1) since it failed to address the impact of the severity of Appellant's mental disability to make an intentional misrepresentation of fact such that severance based upon fraud was proper.

II. IN THE EVENT THAT THE COURT DOES NOT AGREE WITH THE ANALYSIS IN ARGUMENT I, THE BOARD'S CONCLUSION THAT THE GRANT OF SERVICE CONNECTION FOR PTSD WAS THE PRODUCT OF CLEAR AND UNMISTAKABLE ERROR IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

A. What Constitutes Clear and Unmistakable Error.

38 C.F.R. § 3.105(d) provides that "service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the

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[2] The Board conducted a two-part analysis in severing appellant's service-connected disability compensation, turning to whether the 1998 grant of service connection contained clear and unmistakable error (CUE), after concluding that appellant had committed fraud. Since appellant did not commit fraud, the inquiry as to whether there was CUE is not appropriate, as appellant's service-connected disability is protected.

Government)." As this Court interpreted this regulation in *Graves v. Brown*, 6 Vet.App. 166 (1994):

> The burden is on the Secretary to show that a prior grant of service connection was clearly and unmistakably erroneous. "In effect, [38 C.F.R.] § 3.105(d) places at least as high a burden of proof on the VA when it seeks to sever service connection as [38 C.F.R.] § 3.105(a) [1993] places upon an appellant seeking to have an unfavorable previous determination overturned." *Baughman [v. Derwinski,* 1 Vet.App. [553] at 566 [(1991)]. The VA must meet the burden of proof and demonstrate that the granting of service connection was clear and unmistakable error; failure to do so is error as a matter of law. *Id.; see also Oppenheimer v. Derwinski*, 1 Vet.App. 370, 372 (1991). In this regard, we hold that CUE is defined the same way under 38 C.F.R. 3.105(d) as it is under 38 C.F.R. § 3.105(a).

6 Vet.App. at 170.

Clear and unmistakable error (CUE) "is a very specific and rare kind of error," of fact or law, that is *undebatable*, and "when called to the attention of later reviewers *compels* the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different, but for the error." *Fugo v. Brown*, 6 Vet.App. 40, 43 (emphasis in original). This Court has defined CUE in the following manner:

> Either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the

> time were incorrectly applied....[CUE] is the sort of error which, had it not been made, would have manifestly changed the outcome...[, an error that is] undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed.

Crippen v. Brown, 9 Vet.App. 412, 418 (1996) (quoting *Russell v. Principi*, 3 Vet.App. 310, 313 (1992) (en banc)). The Court has also explained that a finding of CUE requires "more than a disagreement as to how the facts were weighed or evaluated." *Id.*

Although a CUE determination must be based only upon evidence of record at the time of the challenged decision, a determination to sever service connection is not similarly limited. Regulations clearly do not limit reviewable evidence to that which was before the RO in making its initial service connection award, and clearly contemplates consideration of evidence acquired after such initial determination. *Daniels v. Gober*, 10 Vet.App. 474 (1997); 38 C.F.R. § 3.105(d)(this section expressly states that after severance is proposed, the claimant must be given time to present additional evidence that service connection should be maintained.)

B. The Applicable Standard of Court Review.

In the decision on appeal, the Board determined that the grant of service connection for appellant's PTSD with dysthymia and depression was the product of clear and unmistakable error. Such a determination may be set aside where the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law." *Graves,* 6 Vet.App. at 171(citing *Russell, supra* at 315; 38 U.S.C. § 7261(a)(3)(A)).

C. The Grant of Service Connection Cannot Undebatably Be Wrong Given the Diagnosis of PTSD Based Upon All of the Evidence of Record.

The Board made a finding of fact that "[b]ut for the errors in the May 1998 rating decision, service connection for PTSD . . . would not have been granted." (R. 6). It follows from this finding that the grant of service connection was not undebatably wrong given the fact that notwithstanding the other diagnoses of PTSD of record, the May 2005 private psychiatric report diagnosed PTSD—even after consideration of all of the evidence of record, including the records related to severance. (R. 2264-2270).

While the Board concludes that the May 2005 PTSD diagnosis is predicated on "the incident pertaining to Mr. H which occurred in 1969", this conclusion is false. A simple review of the record indicates that Dr. Tripi considered all of the evidence of record. In fact, she outlined the evidence she considered in issuing her diagnosis. She even considered Appellant's claims file outlined the materials relating to severance, including the OIG report contained in the claims file. (*See* R. 2264-68). Unlike the November 2004 VA examiner, Dr. Tripi even considered other stressors of record. (*See* R. 2270). That there is a PTSD diagnosis based upon all of the evidence of record clearly establishes that the grant of service connection cannot undebatably be wrong; this shows that VA has not met its severance burden.

This Court makes clear in *Daniels,* 10 Vet.App. at 480, that a determination whether a decision granting service connection was the product of CUE for the purposes of severance would not be limited to the evidence of record at the time of the May 1998 rating decision. Thus, any later-added evidence, including the May 2005 diagnosis of PTSD based upon all of the evidence of record, can serve to preserve the grant of service connection. Accordingly, the Board's decision that the grant of service connection was the product of CUE is arbitrary, capricious, and contrary to law.

D. The Grant of Service Connection Cannot Undebatably Be Wrong Given the Fact that a Diagnosis of PTSD May Have Been Based Upon the February 1969 Stressor.

As noted above, the Board concluded that in the May 1998 rating decision granting service connection for PTSD:

> the RO recited the veteran's claimed, and unverified, stressor of witnessing the death of fellow service person Gary H. The RO noted that the veteran supplied a copy of [G]ary H.'s death certificate, which showed that he died due to a crush injury of the chest. . . . Crucially, however, the claimed stressor was not simply that Gary H. died, but that the veteran personally participated in a rescue attempt and in subsequent efforts to extricate Gary H.'s body from the nose wheel of the aircraft, and [m]orcover, that he was a close personal friend of Gary H.

(R. 25). It follows from this Board finding that the grant of service connection was not undebatably wrong given the fact-that his PTSD diagnosis is supportable based on the February 1969 stressor alone. Despite the Board's conclusions, the OIG report has shown only that available veterans from whom statements were taken at the accident scene cannot now remember whether or not they had seen Appellant at the chaotic scene thirty-five years earlier. Curiously, the Board misstates that it is the friendship with Gary Holland and his participation in the rescue attempts upon which the May 1998 grant was based; however, the rating decision actually based the grant upon Appellant's witnessing the scene alone *(see* R. 383), which has not been successfully challenged by the OIG report. As such, it cannot be said that the May 1998 rating decision would not stand but for the OIG report.

Furthermore, while the Board attempts to base its finding that severance was proper upon the November 2004 "change in diagnosis" under 38 C.F.R. § 3.105(d), there has been no suggestion that the May 1998 VA examiner, October 2002 VA examiner, or March or April 2003 private examiners who diagnosed PTSD would change their diagnosis in light of the OIG report. Certainly, the May 2005 private examiner determined that witnessing the death of Gary Holland alone, even if his participation in rescue attempts could not be verified, coupled with the December 1969 stressor, were enough to support a diagnosis of PTSD. Thus, severance cannot be based on the November 2004 VA examination "change in diagnosis." This shows that VA has not met its severance burden. Accordingly, the Board's decision that the grant of service connection was the product of CUE is arbitrary, capricious, and contrary to law.

E. The Grant of Service Connection Cannot Undebatably Be Wrong Given the Fact that a Diagnosis of PTSD May Have Been Based Upon the December 1969 Stressor Alone.

The Board erroneously concludes that the only cited stressor of record was the February 1969 death of Gary Holland. However, August 1993 Appellant's application for service connection for PTSD shows that the Board's statement is false. The December 13, 1969 personal assault by shore patrol was actually the first stressor claimed by Appellant. (*See* R. 270).[3] Moreover, there is uncontradicted evidence that the December 1969 stressor occurred. Service records provides conclusive proof that Appellant was apprehended by the shore patrol, was placed in a straitjacket, was hospitalized, and was involuntarily injected multiple times with thorazine. (R. 60).[4]

It follows from the Board's conclusion that the grant of service connection was not undebatably wrong given that personal assault by the shore patrol or other

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[3] Despite this fact, the Secretary should be reminded that a claimant need not allege every alternative theory upon which a claim may be established. In *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001) and *Szemraj v. Principi*, 357 F.3d 1306, 1310 (Fed. Cir. 2004), the Federal Circuit held that VA has a duty to sympathetically read a veteran's allegations in benefit claims VA must read all pro se submissions sympathetically to "determine all potential claims raised by the evidence, applying all relevant laws and regulations." *Andrews v. Nicholson*, 421 F.3d 1278, 1282 (Fed. Cir. 2005) (quoting *Roberson, supra* at 1373); *Beverly v. Nicholson*, 19 Vet. App. 394, 405 (2005).

[4] VA conceded this as a stressor in an internal VA C&P examination inquiry dated in February 2005. (*See* R. 1585)

stressors cited by Appellant have already been found to be a sufficient stressor to support the PTSD diagnosis–even with VA failing to assist him in developing evidence of that stressor (which will be described in part V, *infra).* (*See, e.g., R.* 2270). This shows that VA has not met its severance burden.

III. THE BOARD'S REASONS OR BASES ARE INADEQUATE IN THAT IT FAILED TO EXPLAIN ITS CONCLUSIONS THAT THE DECEMBER 1969 STRESSOR WAS RAISED ONLY RECENTLY AFTER SEVERANCE PROCEEDINGS HAD BEGUN AND THAT APPELLANT "CHANGED HIS STORY" THAT HE WITNESSED THE DEATH OF HIS FRIEND, GARY HOLLAND, IN SERVICE, IN LIGHT OF EVIDENCE TO THE CONTRARY.

In its decision, the Board wrote:

> [n]o additional stressors were in fact presented to VA in connected with the veteran's initial claim of entitlement to service connection for PTSD.
>
> . . .
>
> The Board observes in passing that it appears that the veteran raised the purported additional stressors only after service connection for PTSD was granted and the veteran's role in the Gary H. incident, evidently in a[n] effort to shore up a claim which was in the process of falling apart.

(R. 28). These conclusions are directly contradicted by the record on appeal.

First, while the Board maintains that no stressors, but the in-service accident involving Gary Holland, were raised in connection with Appellant's initial claim for service connection for PTSD, Appellant plainly cites the incident of December 13, 1969 [the personal assault by the shore patrol] as a stressor on his application received in August 1993. (*See* R. 60, 270). Furthermore, Appellant claimed this December 1969 stressor, and this December 1969 stressor was considered as early as the March 1991 VA Special Psychiatric Examination. (*See* R. 159-161). Thus, the Board needs to explain this misstatement.

With respect to the Board's "observation" that Appellant only raised additional stressors "only after service connection for PTSD was granted and the veteran's role in the Gary H. incident, evidently in a[n] effort to shore up a claim which was in the process of falling apart", as noted above, the December 13, 1969 stressor was indicated on the face of the August 1993 application and considered in the March 1991 examination.[5]

In addition, the decision suggests that the Appellant recanted his testimony relating to Gary Holland's death on two occasions:

> The Board finds particularly significant the fact that the veteran changed his account once the

---

[5] The Secretary is also reminded of 38 C.F.R. § 4.23. In the exercise of their functions, VA employees must not allow their personal feelings to intrude. Fairness and courtesy must at all times be shown to applicants by all employees. This is especially so where, as in this case, the record contradicts the "observations" made by the Board in this severance of a protected rating.

> RO proposed to sever his service-connected benefits. The veteran's recent account, as stated in a November 2004 letter and at his June 2005 hearing, appears to concede that he did not in fact participate in the rescue of Gary H., but that he was merely aware of the incident.

(R. 20). The Board decision concludes that Appellant somehow reported that he did not witness Gary Holland's death in his November 2004 letter. However, the letter actually concludes:

> **I was at NAF Naples, Italy on February 4, 1969, I was assigned to the Transient Line Operations, and according to the "Special" Report of Enlisted Performance Evaluation dated 6 Feb 69 and signed by H.R. Truesdale, LCDR, USN I was assigned to the transient line and that my duties were to park, direct and tow assigned and transient aircraft. I was involved in the accident that caused the death of my friend, Gary D. Holland and I believe that VARO Milwaukee does not have any official military documentation to say that I was not there on that day.**

(R. 1497)(emphasis added). This statement directly contradicts the Board's statement that Appellant conceded anything about his participation in the death of his friend, Gary Holland.

In addition, while the Board suggests that Appellant reported that he did not witness the in-service accident involving Gary Holland during the

June 2005 BVA hearing, the record shows that Appellant actually testified:

> **I was a lineman. I was an E3 at the time [of the accident]. I was left in charge of the line operation shack when this accident happened in February of '69. Although I'm being told not to dwell on it, the point is, it's still a stressor and they're defaming my service and they're degrading the hell out of that stressor.**

(R. 2314) (emphasis added). Again, the Board's conclusion that Appellant has conceded anylhing about his statements that in-service accident involving Gary Holland in the November 2004 letter, the 2005 hearing, or elsewhere, is directly contradicted by the record. Because of these misstatements, the Board failed to provide adequate reasons or bases for its conclusions that Appellapt has "changed his story" that the accidental death of Gary Holland in service is a PTSD stressor.[6]

---

[6] It appears that during the June 2005 hearing and elsewhere, Appellant attempted to present legal arguments, including references to cases including *Suozzi* and *Pentecost* to further support his argument that his protected rating should be preserved. The Board used this legal argument, albeit misplaced, to suggest that Appellant was recanting his testimony regarding the death of Gary Holland. (R. 21). As demonstrated above, however, Appellant did testify that his reported stressor was accurate during that very same hearing. This unemployed, mentally-ill, non-attorney husband and father should not be penalized by the author of the Board's decision for offering legal arguments to prevent the severance of his long-standing benefits. The Board failed to reconcile Appellant's testimony in the February 2005 hearing that the February 1969 stressor was a

IV. THE BOARD'S STATEMENT OF REASONS OR BASES VIOLATED 38 U.S.C. § 7104(d)(1) SINCE THE BOARD RELIED WITHOUT ADEQUATE EXPLANATION ON A VA MEDICAL OPINION THAT FAILED TO ADDRESS THE POSITIVE EVIDENCE OF RECORD AND WAS NOT SECURED IN AN IMPARTIAL, UNBIASED, AND NEUTFUL MANNER.

A. Gabrielson v. Brown

This Court has ruled that the VA cannot rely upon an expert medical opinion that fails to discuss all of the evidence that supports a claim. In *Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994), the Court held:

> An I[ndependent] M[edical] E[xpert] opinion is only that, an opinion. In an adversarial proceeding, such an opinion would have been subject to cross-examination on its factual underpinnings and its expert conclusions. The VA claims adjudication process is not adversarial, but the Board's statutory obligation under 38 U.S.C. § 7104(d)(1) to state "the reasons or bases for [its] findings and conclusions" serves a function similar to that of cross-examination in adversarial litigation. The BVA cannot evade this statutory responsibility merely by adopting an IME opinion as its own, where, as here, the IME opinion fails to discuss

---

valid and accurate one with its suggestion that Appellant has "changed his story."

> all the evidence which appears to support appellant's position.

Similarly, in *Abernathy v. Principi*, 3 Vet.App. 461, 464-65 (1992), the Court held that the BVA cannot validly rely on a medical opinion that does not discuss all of the evidence that supports appellant's claim.

Although in its decision the Board mentioned the May 2005 PTSD diagnosis of PTSD, the November 2004 VA examiner was not provided with the opportunity to consider the May 2005 diagnosis of PTSD. This diagnosis was highly pertinent since it post-dated the agency severance proceedings, was conducted by a specialist in traumatic stress, contradicted the findings in the November 2004 examination report, and was based upon all of the evidence of record, including the OIG report. (R. 2264-2270). As such, it should have been considered by the November 2004 VA examiner.

In addition, the November 2004 VA examination report did not address the reports of other VA and private examiners who properly considered the December 1969 stressor in diagnosing PTSD. For example, the March 1991 VA Special Psychiatric Examination report considered the December 1969 stressor (R. 160), and the April 2003 private psychiatric record also diagnosed PTSD based upon cited stressors--including the December 1969 personal assault. (R. 947-48). As such, the Board's reliance on the November 2004 VA examination report is in error.

B. Medical Opinion Not Secured in Impartial, Unbiased and Neutral Manner.

A BVA decision which relies upon a medical opinion obtained by a process that does not ensure an impartial opinion violates fair process. *See Thurber v. Brown*, 5 Vet.App. 119, 122-24 (1993). Basic fair play requires that evidence be procured by the agency in an impartial, unbiased, and neutral manner. *Austin v. Brown*, 6 Vet.App. 547, 552 (1994). In *Colayong v. West*, 12 Vet.App. 524, 534-35 (1999)(citing *Bielby v. Brown*, 7 Vet.App. 260, 268-69 (1994)), a medical opinion based upon an inquiry limited to two narrow issues was rendered non-evidence because instructions may not "suggest an answer or limit the field of inquiry by an expert."

In finding that severance of service connection was proper, the Board relied upon the November 2004 VA medical opinion that was solicited in the October 2004 internal Compensation and Pension Exam inquiry. (R. 1367). However, that inquiry wholly excluded consideration of the February 1969 stressor in determining whether Appellant's diagnosis of PTSD should be continued and failed to instruct the VA examiner that the December 1969 or other stressors must be considered. (*See* R. 1366-67). The later February 2005 C&P examination report inquiry did correct the errors in the October 2004 inquiry, eliminating the death-knell that fraud was a foregone conclusion and containing a proper request that examiners consider the personal assault stressor in December 1969. (*See* R. 1584). Unaware of the tainted internal agency communication, however, Appellant simply sought to have his claim adjudicated based upon the evidence of record. Thus, a later examination

was cancelled and the tainted instructions remained the only instructions provided to the November 2004 VA examiner. Because the inquiry instructions limited the examination, and guaranteed a negative conclusion by eliminating consideration of stressors, the November 2004 VA examination report is fatally-flawed.

Because, as noted above, fairness of the adjudication process has been compromised by the limiting instructions for the VA examination dated in October 2004, the Board should explain why the November 2004 VA medical examination report, upon which it relied in its denial, was not non-evidence since it had been tainted by the RO's improper instructions.

V. THE BOARD FAILED IN ITS DUTY TO ASSIST APPELLANT IN DEVELOPING HIS CLAIM FOR SERVICE CONNECTION FOR PTSD IN FAILING TO SECURE A MEDICAL OPINION CONSIDERING WHETHER HIS CITED DECEMBER 1969 STRESSOR WAS SUFFICIENT TO SUSTAIN HIS DIAGNOSIS OF PTSD.

38 U.S.C. § 5103A provides, in pertinent part,

(D) Medical examinations for compensation claims.

(1) In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) [duty to assist] shall include providing a medical examination or obtaining a medical opinion when such an

examination or opinion is necessary to make a decision on the claim.

(2) The Secretary shall treat an examination or opinion as being necessary to make a decision on a claim for purposes of paragraph (1) if the evidence or record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant)–

(A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and
(B)indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service; but
(C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.

This case involves a claim for disability compensation within the meaning of 38 U.S.C. § 5103A(d)(1).

In this case, while VA granted service connection in May 1998 based primarily upon the February 1969 accident involving Gary Holland, it was not the only cited stressor of record. As noted above, Appellant cited the December 1969 personal assault by shore patrol in his August 1993 claim for benefits and elsewhere. (*See* R. 270).

It is VA's longstanding policy is to consider claims of PTSD based on Personal Assault. M21-1 Manual

Chapter 5, Subchapter II, Section 5.14(d) PTSD Claims Based on Personal Assault states:

> (1) Veterans claiming service connection for disability due to an in-service personal assault face unique problems documenting their claims. Personal assault is an event of human design that threatens or inflicts harm. Examples of this are rape, physical assault, domestic battering, robbery, mugging, and stalking. Although these incidents are most often thought of as involving female veterans, male veterans may also be involved. Care must be taken to tailor development for a male or female veteran. These incidents are often violent and may lead to the development of PTSD secondary to personal assault.
>
> (2) Because assault is an extremely personal and sensitive issue, many incidents of personal assault are not officially reported, and victims of this type of in-service trauma may find it difficult to produce evidence to support the occurrence of the stressor. Therefore, alternative evidence must be sought.
>
> (3) To service connect PTSD, there must be credible evidence to support the veteran's assertion that the stressful event occurred. This does not mean that the evidence actually proves that the incident occurred, rather that there be at least an approximate balance of positive and negative evidence that it occurred.

> (4) Review the claim and all attached documents. Develop for SMRs and MPRJ infomation as needed.
>
> (a) Service records not normally requested may be needed to develop this type of claim. [A]dditional information sources include:
> Family members or roommates,
> Medical reports from civilian physicians or caregivers who may have treated the veteran either immediately following the incident or sometime later,
> A chaplain or clergy,
> Fellow service persons, or
> Personal diaries or journals.
>
> (b) Obtain any reports from the military police, shore patrol, provost marshal's office, or other military law enforcement.

The record does not reflect that VA made attempts to secure shore patrol reports or to otherwise make attempts to corroborate the December 1969 assault, as required by even the agency's own binding operating procedures. In light of the current diagnoses of PTSD, and Appellant's consistent allegations relating to the December 1969 personal assault, which indicates that the disability may be associated with service, VA was required to provide Appellant with an examination considering whether the December 1969 stressor was sufficient to sustain a diagnosis of PTSD. *See also*

McLendon v. Nicholson, _ Vet.App. _, No. 04-0185, slip op. at 9-10 (Vet.App.Ct. June 5, 2006)[7]

VI. The Court should vacate that part of the Board's decision denying Appellant's remaining claims because they are inextricably intertwined with the appeal of the determination that severance of PTSD with dysthymia and depression were proper.

The Board's errors in determining that Appellant's service-connected PTSD with dysthymia and depression were properly severed in November 2004 and January 2005 rating decisions are outlined above. The Board's August 26, 2005 decision, however, also denied an effective date earlier than July 16, 1992 for the grant of PTSD with dysthyrnia and depression, denied separate cornpensable ratings for dysthymia and depression, dismissed the claim that various RO rating decisions were based upon CUE, and denied service connection for tobacco use, alcohol abuse, a

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[7] Under the law, the Secretary can escape his duty to assist a claimant only "if no reasonable possibility exists that such assistance would aid in substantiating the claim." 38 U.S.C. § 5103A(a)(2); 38 C.F.R. § 3.159(c)(4)(d); *see Duenas v. Principi*, 18 Vet.App. 512 (2004). Given the evidence of record, it cannot be said, and the Board did not find, that no reasonable possibility exists that obtaining a medical opinion addressing whether Appellant's current diagnosis of PTSD could be sustained based upon the December 1969 stressor and other cited stressors would reach a positive conclusion. The record reflects that it is reasonably possible that if the VA obtained such a medical opinion it would conclude that Appellant's diagnosis of PTSD would stand even if his actual participation in rescue attempts was barred from consideration as a stressor.

digestive disorder, erectile dysfunction, an eye disorder, obesity, chronic fatigue syndrome, a personality disorder, a cardiovascular disorder, a pulmonary disorder, and arthritis of the right knee, all as secondary to the severed service-connected PTSD with dysthymia and depression.

This Court's disposition of the appeal of service connection for PTSD with dysthymia and depression has a direct impact on the remaining claims. As such, the claims cited are "inextricably intertwined" with the appeal of the Board's determination that severance of service connection for PTSD with dysthymia and depression was proper. *See Henderson v. West*, 12 Vet.App. 11, 20 (1998) ("Where a decision on one issue would have a 'significant impact' upon another, and that impact in turn 'could render any review by this Court of the decision [on the other claim] meaningless and a waste of judicial resources', the two claims are inextricably intertwined;" *quoting Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991)). As Appellant is seeking to have the determination that severance of service connection for PTSD for dysthymia and depression was proper set aside, he expressly requests that all claims at issue in the August 26, 2005 Board decision be vacated since they are inextricably intertwined with the severance of service connection for PTSD.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, the Court should reverse the Board's decision severing appellant's service-connected disability compensation and restore service connection for PTSD with dysthymia and

depression, and remand this matter consistent with the arguments raised above.

APPENDIX O

UNITED STATES COURT OF APPEALS FOR VETERANS' CLAIMS

No. 05-2425

[Filed July 23, 2007]

KEITH ALBERT ROBERTS, Appellant	)
v.	)
R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, Appellee	)

SUPPLEMENTAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. MAY THE UNITED STATES SECRETARY OF VETERANS AFFAIRS CIRCUMVENT THE SUBJECT MATTER JURISDICTION OF THE BOARD OF VETERANS' APPEALS UNDER 38 U.S.C. § 7104; THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS UNDER 38 U.S.C. § 7252; OR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT UNDER 38 U.S.C. § 7292 BY CAUSING HIS AGENTS OR EMPLOYEES TO BRING AN ALLEGATION OF WRONGDOING TO THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE PURPOSE OF COMMENCING A CRIMINAL PROSECUTION WHILE THE SAME FACTUAL AND LEGAL DISPUTE REMAINS PENDING BEFORE THIS COURT.

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APPEAL OF THE SAME ALLEGATION BEFORE THE BOARD OF VETERANS APPEALS AND THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS CONTRARY TO 38 U.S.C. § 7104; 7252.

CERTIFICATE OF SERVICE

ON the date affixed below I personally transmitted foregoing motion to the Clerk of the Court and the Office of General Counsel and then mailed the documents listed below by first class certified mail, postage sufficient, to the Clerk of the Court; the Office of General Counsel and to the Appellant at the addresses set forth below:

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1. Certificate of Service.

2. Supplemental Brief of Appellant.
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IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS' CLAIMS

KEITH Albert ROBERTS,
Appellant,

v. Vet. App. No. No. 05-2425

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,
Appellee.

SUPPLEMENTAL BRIEF OF THE APPELLANT

The Appellant, Keith A. Roberts, (hereinafter "Appellant"), pursuant to U.S. Vet. App. *R. 27* and *28*, respectfully submits to the United States Court of Appeals for Veterans Claims ("CAVC" or "Court") his supplemental brief. The record of appeal is referred to as (ROA-) or (Supp. ROA-). Documents attached in the appendix as exhibits are referred to as (App. exh. -). The record in *U. S. v Roberts*, United States District Court for the Eastern District of Wisconsin, docket 05-cr-118; United States Court of Appeals for the Seventh Circuit, 07-1546, March 12, 2007, is referred to by the Federal Court PACER document docket number. (PACER -).

The Court ordered supplemental briefing in this appeal by an order dated June 25, 2007. The Secretary filed the supplemental record on appeal on July 10, 2007.

STATEMENT OF THE CASE

This appeal involves fundamental questions of due process and the manner in which the Secretary must proceed in benefits claims disputes where an allegation of fraud is made against a beneficiary. This appeal also raises the issue of the lawful procedure and timing of referrals of VA fraud cases to the U.S. Treasury for collections and to the Attorney General of the United States for possible criminal prosecution.

The plain reading of the statutes as found in title 38 of the United States Code and their related regulations leave no doubt that the intent of Congress was that veterans not be forced to defend themselves simultaneously in two federal judicial forums. The Appellant argues that a plain reading of these statutes and regulations mandates their application in his case. See *Splane v West*, 216 F.3d 1058 (Fed. Cir. 2000); and *Roper v Nicholson*, 20 Vet. App. 173 (2006). See 38 C.F.R. § 14.561.

As a result of the failure of the Secretary to comply with his own rules and regulations the Appellant was prosecuted for wire fraud for receiving electronic fund transfers of his monthly VA payments for service connected disability. As detailed in this brief, the conduct of the Secretary and his agents and employees has been contrary to law, in bad faith, and highly adversarial. There is an inference of impropriety by an number or senior officials in the U.S. Department of Veterans Affairs.

JURISDICTIONAL STATEMENT

The Court has jurisdiction to hear this appeal as it was timely filed and concerns the failure of the Board to properly apply the regulations, statutes and case law relevant to reduction of disability benefits, post reduction collection activity and the proper procedure for investigating and adjudicating allegation of fraud. The Court enjoys exclusive subject matter jurisdiction over disputes involving veterans benefits. The actions of the Secretary, the Director, Compensation and Pension Service, the Director, VARO Milwaukee, Wisconsin, (Supp. ROA 35), in this matter appear to have been intended to circumvent the exclusive subject matter jurisdiction over appeals concerning veterans benefits. See *Scarborough v Principi,* 124 S.Ct. 1856, 541 U.S. 401, 158 L.Ed. 2d 674 (U.S. 2004), fn. 3.

This court has jurisdiction under 38 U.S.C § 7252. A serious question of conflict of law is raised by this case.

The relevant statutes are: 18 U.S.C. § 1341, mail fraud; 18 U.S.C. § 1343, wire fraud; 31 U.S.C. § 3801-3812, Program Fraud Civil Remedies Act, fraud; 38 U.S.C. § 301; 38 U.S.C. § 303; 38 U.S.C. § 6103; 38 U.S.C. § 7104; 38 U.S.C. § 7252; and 38 U.S.C. § 7292.

Regulations: 38 C.F.R. § 3.900 *et seq*; 38 C.F.R. § 3.905; 38 C.F.R. § 14.561; and 38 C.F.R. § 42.1-42.47 *et seq*.

The significant case law is: *Accardi v Shaughnessy*, 347 U.S. 260 (1954); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961); *Cook v Principi*, 318 F.3d 1334 (Fed. Cir. 2002), Gajarsa, J., Dissenting; *D'Amico v. West*,

209 F.3d 1322 (Fed. Cir. 2000); *Hodge v. West*, 155 F. 3d 1356 (Fed. Cir. 1998); *Roper v Nicholson*, 20 Vet. App. 173 (2006); *Scarborough v Principi*, 124 S.Ct. 1856, 541 U.S. 401, 158 L.Ed. 2d 674 (U. S. 2004) ; *Service v Dulles*, 354 U.S. 363 (1957); *Splane v West*, 216 F.3d 1058 (Fed. Cir. 2000); *Trilles v West*, 13 Vet App 314 (2000); *United States v Roberts*, U.S. District Court, Eastern District of Wisconsin, docket 05-cr-115; U.S. Court of Appeals for the Seventh Circuit, docket 07-1546, filed March 12, 2007; *Vitarelli v Seaton*, 359 U.S. 535 (1959); and *Weaver v Principi*, 00-2284, Un. Pub. 03/15/01,
Per Curiarn.

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES

In November of 2003 the Appellant contacted the VA Office of the Inspector General (VAOIG). He was convinced that the transcript of a local hearing at the VARO in Milwaukee, Wisconsin had been altered. In December, 2003, the VA IG commenced an investigation not of the VARO staff, but of the Appellant. On July 8, 2004, the VAOIG issued a report of investigation. (ROA at 1628-2222). On August 16, 2004, the VARO proposed severing the disability compensation benefits of the Appellant using the procedures and standards normally associated with medical improvement of a condition.[1] On October 5,

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[1] At no time since the inception of the effort to deny the Appellant disability benefits he has been afforded the due process protections incorporated in 38 C.F.R. §§ 3.900-3.905. The record is devoid of any indication that the V.A. Regional Counsel was involved in this case, or that the V.A. General Counsel was formally involved.

2004, Mr. Phil Wilkerson of the American Legion contacted the VAOIG and requested a copy of the report of investigation. (Supp. ROA 14, 15). On October 15, 2004, Mr. Wilkerson wrote to Renee Szybala requesting a copy of the report of investigation. (Supp. ROA 17-21). In November of 2004 the Appellant and his family were subjected to collection activity by the U.S. Government for an alleged overpayment of benefits which was on appeal. (Supp. ROA 23-28). On November 22, 2004, the Appellant wrote to the Secretary and raised the lack of due process and fundamental fairness in his letter. (ROA at 1492-1498). Renee Szybala responded to this letter. (Supp. ROA 35). On December 13, 2004, Mr. Wilkerson wrote to the Director, VARO regarding the lack of due process in the adjudication of the benefits claims. (Supp. ROA 30). As early as January 27, 2005, employees of the Veterans Benefits Administration were actively pursing a criminal indictment of the Appellant. (Supp. ROA 32-33). See 38 C.F.R. § 14.561. On April 26, 2005, VA OIG agent Vasil testified to a federal grand jury which resulted in an indictment for mail fraud against the Appellant.

The Appellant required leave of the U.S. District Court so that he could travel to Washington, D.C. for the hearing before the Board on June 13, 2005. The Appellant informed the Board that he was under indictment for the same dispute. (ROA at 2315). On August 26, 2005, the Board issued a rather remarkably disingenuous decision in which, *inter alia,* they artfully failed to mention the criminal indictment, or to address the failure to follow the procedures set forth in 38 C.F.R. §§ 3.900-3.905 and 38 C.F.R. § 14.561. The notice of appeal in this case was filed on

August 26, 2005.[2] On September 13, 2005, a superseding indictment for wire fraud was issued. An extensive counter designation of the record was filed in this case. Further supplementation of the record was necessary in order to make the record reasonably complete. The Secretary has omitted critical evidence from this record. Page 2 of the VA-9 dated December 22, 1994, is one of the most important pages of the record as it is the basis for Appellant's PTSD stressor argument. It was not included in the ROA, and was kept out of evidence in the criminal trial. (Supp. ROA 2). The brief of the Appellant was filed on August 26, 2006. Counsel for the Appellant at that time refused to address the pending criminal charges in the brief. Counsel also refused to file a motion under Rule 8 to inform the Court of the pending criminal matter.

A jury trial was held beginning November 6, 2006. On November 8, 2006, the Appellant was found guilty of fraudulently receiving V.A. disability benefits. He was sentenced to 48 months of imprisonment and fined $262,943.52. The Assistant U.S. Attorney made misrepresentations to the Court regarding the laws and regulations controlling V.A. disability benefits. He also misrepresented the criminal history of the Appellant in order to obtain sentence enhancement. The brief of the Secretary filed on December 11, 2006, disclosed the conviction to this Court for the first time. The Secretary argued that criminal conviction in which he had assisted while this appeal was pending

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[2] The first opportunity for the Appellant to review the report of the VAOIG did not occur until the designation of the record was issued in this appeal, December 28, 2005.

formed a basis for denial of the relief sought in this appeal.

The Appellant filed his principal brief with the United States Court of Appeals for the 7th Circuit, docket number 07-1546, on June 29, 2007.

ARGUMENT AND AUTHORITIES

I. MAY THE UNITED STATES SECRETARY OF VETERANS AFFAIRS CIRCUMVENT THE SUBJECT MATTER JURISDICTION OF THE BOARD OF VETERANS' APPEALS UNDER 38 U.S.C.§ 7104; THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS UNDER 38 U.S.C. § 7252; OR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT UNDER 38 U.S.C. § 7292 BY CAUSING HIS AGENTS OR EMPLOYEES TO BRING AN ALLEGATION OF WRONGDOING TO THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE PURPOSE OF COMMENCING A CRIMINAL PROSECUTION WHILE THE SAME FACTUAL AND LEGAL DISPUTE REMAINS PENDING BEFORE THIS COURT.

The Secretary has caused a criminal prosecution in Federal District Court to be initiated against the Appellant while he was still before this Court litigating the same facts, transactions and occurrences. The VA regulation for initiating criminal charges against a veteran was not followed, 38 C.F.R. § 14.561. The same factual and legal issues relied upon in the criminal prosecution and deemed settled by the U.S. District Court have not been decided by this court. *U.S. v Roberts*, U.S. District Court for the Eastern

district of Wisconsin, case number 1:05-cr-00118. United States Court of Appeals for the Seventh Circuit, 07-1546, March 12, 2007. The District Court improperly gave *res judicata* effect to the Board decision now under review.

The VA disability benefits of the Appellant were severed, not terminated for fraud.

On April 26, 2005, VA employee Ray Vasil gave the only testimony before a federal grand jury in the U. S. District Court for the Eastern District of Wisconsin. There appears to have been no involvement in this case by the VA Regional Counsel, Postal Inspection Service,[3] the Secret Service or the Federal Bureau of Investigation. Their investigation of the matter is required by either VA or U.S. Department of Justice internal policies.

The Appellant was indicted on April 26, 2005 on five counts of mail fraud. Later a superceding indictment was filed which dropped the mail fraud allegations and charged five counts of wire fraud for accepting VA benefits payments by electronics fund transfer. The Appellant moved to dismiss the criminal charges. He argued, *inter alia*, that his appeal remained pending in the VA claims system and thus the District Court had no jurisdiction to take up the prosecution until a final decision was made in his benefits appeals. All of his jurisdictional motions were either denied or ignored by the District Court.

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[3] The demise of the indictment for mail fraud seems to be related to the lack of involvement of the Postal Inspectors in this case. They enjoy exclusive subject matter jurisdiction over mail fraud.

The 7th Circuit has addressed jurisdictional issues relating to the VA in the past and found that even prior to the creation of this Court, the District Court could not meddle in VA benefits claims adjudication matters. See *Marozsan v U.S. and the U.S. Department of Veterans Affairs,* 852 F.2d 1469 (7th Cir. 1988, *en banc*).

On November 8, 2006, the Appellant was convicted of five counts of wire fraud under 18 U.S.C. § 1343 for receiving 100% disability benefit payments from the VA for post traumatic stress disorder. A notice of that conviction was appended to the Brief of the Appellee with the brief filed on December 11, 2006.

The Appellant is presently incarcerated as his motion for release pending appeal was denied.

The Secretary and the General Counsel were well aware of the criminal proceedings running concurrently with this appeal. (Supp. App. 32, 35, Brief of Appellee).

This Court has exclusive subject matter jurisdiction over the disputed disability benefits.

We have now arrived at the intersection between the jurisdiction of this Court and that of a Federal District Court presiding in a criminal matter over a disputed involving veterans benefits that congress sought to avoid.

The Secretary appears to have willfully and intentionally circumvented the exclusive subject matter jurisdiction of this Court by failing to follow his own regulations regarding allegations of fraud in

benefits claims (38 C.F.R. § 3.905, 14.561. A VA employee presented misleading testimony to a federal grand jury. At the trial in Federal District Court VA employees misrepresented the standards for the award of disability benefits based on non-combat P.T.S.D. They confused both the jury and the Court and procured a criminal conviction when they could not prove fraud in the VA administrative forum.

The Appellant informed the Secretary of the violation of his due process rights on November 22, 2004. Letter (ROA 1492-1498).

Ms. Renee Szybala, who responded to the letter for the Secretary, then appears to have had a direct involvement in orchestrating the efforts to commence criminal proceedings against the Appellant in Federal District Court when she knew his appeals were pending at either the BVA or this Court. (Supp. ROA 32, 35).

This Court has exclusive jurisdiction over the benefits dispute. See *Scarborough v Principi*, 124 S.Ct. 1856, 541 U.S. 401, 158 L.Ed. 2d 674 (U.S. 2004), fn. 3., 38 U.S.C § 7252. A serious question arises in this case regarding violations of the fundamental right of due process of law in the proceedings below and in the Federal District Court. It is for this court to protect those rights when they are violated by the Secretary of Veterans Affairs. "The judicial power of the United States is extended to all cases arising under the Constitution." Justice John Marshall, *Marbury v Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). It is for this Court, and this Court alone, to assert jurisdiction over this benefits appeal and say in the first instance what is and is not a proper application of

the laws under Title 38 of the United States Code. The Federal District Court judge usurped that authority and then made it patently clear in his orders denying the pre-trial motions of the Appellant that he has no understanding of VA benefits law.

The Secretary has a clear and unambiguous duty to follow his own rules and regulations regarding fraud allegations and the proper procedures for forwarding such allegations to the Attorney General of the United States for criminal prosecution.

In this case the pursuit of the criminal conviction of the Appellant was ongoing during the pendency of this appeal. The Secretary willfully and knowingly circumvented the jurisdiction of this Court and his employees and agents made material misrepresentations of the precedent rulings of this Court and the U.S. Court of Appeals for the Federal Circuit in open court, under oath. They kept page two of the VA form 9 of out of the record before this court and out of evidence in the criminal proceedings. (Supp. App. 2, ROA 2372).

The administrative proceedings below were improperly conducted to deny the Appellant fundamental fairness and the basic due process protections set forth in 38 C.F.R. §§ 3900-3905.

Had a determination of fraud actually been made, the Appellant would have still had the right to appeal that decision.

The VA procedure for referring a benefits fraud case to the U.S. Department of Justice does not seem to envision a VA employee testifying before a federal

grand jury absent any prior review by the VA office of General Counsel or the Regional Counsel. 38 C.F.R. §§ 3900-3905, §§ 14.561. There was no potential for continuing harm to the agency after they terminated the benefits to the Appellant. There was no exigent circumstance to justify the conduct of the Secretary. The Appellant is now incarcerated for filing a claim for V.A. benefits.

II. MAY A REDUCTION IN, OR SEVERANCE OF, BENEFITS WHICH HAS RESULTED IN AN OVERPAYMENT TO A VETERAN AND WHICH IS THE SUBJECT OF A PENDING APPEAL WITHIN THE SUBJECT MATTER JURISDICTION OF THE BOARD OF VETERANS' APPEALS UNDER 38 U.S.C. § 7104; THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS 38 U.S.C. § 7252; OR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT UNDER 38 U.S.C. § 7292, BE THE SUBJECT OF COLLECTIONS ACTIVITY BY THE SECRETARY.

The supplemented record on appeal clearly demonstrates that the Appellant and his family have be subjected to virtually instantaneous collection activity by the VARO contrary to law. See (Supp. ROA 23-28).

Collection activity during the pendency of the appeal is in bad faith and is contrary to the concept of a non-adversarial, well ordered and claimant friendly scheme of benefits. 38 U.S.C. §§ 301; 303, *Hodge v. West*, *155* F.3d 1356 (Fed. Cir. 1998); *Weaver v. Principi,* 00-2284, March 15, 2001, Unpublished.

The Secretary has a congressional mandate to ensure that the benefits system of the U.S. Department of Veterans Affairs is administered in a fair and equitable manner. 38 U.S.C. § § 301; 303. The absence of collection activity against the Appellant's daughter Nicolette is explained in an email. (Supp. ROA 8). It seems her alleged overpayment was transferred to the Appellant, while the alleged chapter 35 debt of his daughter Theodora was not.

III. MAY AN EMPLOYEE OR AGENT OF THE SECRETARY OF VETERANS AFFAIRS ACTING IN HIS OR HER OFFICIAL CAPACITY MAKE AN ALLEGATION OF CRIMINAL WRONGDOING REGARDING A VETERAN WHICH CONCERNS A BENEFITS CLAIM TO THE ATTORNEY GENERAL OF THE UNITED STATES WHILE THAT SAME MATTER REMAINS PENDING BEFORE THE BOARD OF VETERANS APPEALS OR THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS ABSENT AN EXPRESS AUTHORIZATION BY THE SECRETARY OF VETERANS AFFAIRS TO DO SO.

The procedures set forth in 38 C.F.R. §§ 3900-3905 and § 14.561 are mandatory. See *Accardi v Shaughnessy,* 347 U.S. 260 (1954); *Service v Dulles,* 354 U.S. 363 (1957); *Vitarelli v Seaton,* 359 U.S. 535 (1959). While this Court does not ordinarily review a factual determination of the Board, it does review such determinations if a constitutional issue is presented. See *D'Amico v. West*, 209 F.3d 1322 (Fed. Cir. 2000).

The relevant laws and their application to these facts are subject to review by this Court. *D'Amico,*

Supra; *Hodge v. West,* 155 F.3d 1356 (Fed. Cir. 1998); *Roper v Nicholson,* 20 Vet. App. 173 (2006); *Scarborough v Principi; Supra.* Failure to follow the procedures established for fraud allegations in this case denied the Appellant fundamental fairness, basic due process rotections, and notice of his right to counsel.

The failure to conduct the necessary evidentiary hearing regarding the allegation of fraud tainted the severance of the disability and education benefits by the VARO. The decision by the Board is the fruit of that poisonous tree, and must be reversed. It is, *inter alia,* contrary to *38* U.S.C. 7104 as it was not based on all the relevant evidence of record. The failure to follow the mandatory procedures was willful, and appears to have been done in an effort to circumvent the obligations attendant to an allegation of fraud. (ROA at 22). See *Trilles v West*, 13 Vet. App. 314 (2000).

In his dissent in *Cook v Principi*, 318 F.3d 1334 *(Fed. Cir. 2002)*, Judge Gajarsa discussed due process and said that:

> "Because breaches in these cases cannot merely be overlooked, I turn to the central constitutional inquiry: what process was due in light of "the practicalities and particularities of the case"? *Mullane v Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In determining what process is due, the court must employ a flexible balancing test that takes into account the particular facts and circumstances, as the need for procedural safeguards varies with the situation: "due process, unlike some legal rules, is not a technical conception with a

> fixed content unrelated to time, place and circumstances." *Cafeteria Workers v McElroy*, 367 U. S. 886, 895 (1961). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v Brewer*, 408 U.S. 471, 481 (1972)." *Cook, Supra*, at 1354.

In the matter before the Court the Appellant was investigated for fraud without notice or warning. None the statutes or regulations governing such actions found in Title 38 U.S. Code or 38 C.F.R. were followed. The benefits of the Appellant were not proposed for termination, and they have never been terminated. The procedures used by the VARO were those used when a disability is to be reduced based on medical improvement, not fraud. The VA employees mention fraud in this record dozens of times, but failed to follow the procedures for such allegations.

The Appellant was entitled to the full panoply of the due process protections set forth in 38 U.S.C. § 6103, 38 C.F.R. §§ 3900-3905 and §§ 14.560; 561.

The Appellant has been subjected to administrative actions artfully tailored to deny him due process in the loss of a property right, his disability benefits. He did not realize that he was also being dragged into a vortex of VA action for which he could, and did, suffer a loss of liberty. To the knowledge of counsel he was never furnished a target letter or informed of his rights as the subject of investigation for criminal activity. He was never given the warnings mandated by *Miranda v Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

The Appellant informed the Secretary of the violation of his due process rights on November 22, 2004. Letter (ROA 1492-1498).

The VA Director, Compensation and Pension Service, Ms. Renee Szybala, appears to have had a direct involvement in orchestrating the efforts to commence criminal proceedings against Roberts in Federal District Court prior to a final decision by either the BVA or this Court. (Supp. ROA at 32, 35).

IV. MAY THE SECRETARY OF VETERANS AFFAIRS REDUCE OR SEVER THE DISABILITY BENEFITS OF A VETERAN BASED ON AN ALLEGATION OF FRAUD ABSENT COMPLIANCE WITH THE PROCEDURES MANDATED IN THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986, 31 U.S.C. §§ 3801-3812 AND 38 C.F.R. §§ 42.1-42.47, TO PROVIDE DUE PROCESS PROTECTIONS TO ALL PERSONS WHO ARE SUBJECT TO THE ADMINISTRATIVE ADJUDICATION OF FALSE, FICTITIOUS, OR FRAUDULENT CLAIMS OR STATEMENTS.

The Appellant has asserted that he is entitled to a hearing envisioned under 38 C.F.R. §§ 42.1-42.47, before a title 5 administrative law judge. He argues, with good reason, that to afford such a hearing to other recipients of VA benefits and contractors but not to disabled veterans situated such as he is creates a constitutionally impermissible disparity in treatment He also argues that the decision of the Board of Veterans Appeals under review in this appeal is of such poor quality and so devoid of any application of

evidentiary principles that it raises the inference that the deciding official was improperly influenced.

The Secretary is prohibited from creating two classes of litigants. The procedural safeguards provided litigants under 38 C.F.R. §§ 42.1-42.47 must also be afforded to veterans that may later be subjected to criminal prosecution and deprivation of liberty and or property. See *Vitarelli, Supra*.

V. MAY THE ATTORNEY GENERAL OF THE UNITED STATES PROCURE A CRIMINAL INDICTMENT BASED ON AN ALLEGATION OF FRAUD COMMITTED BY A VETERAN OF THE ARMED FORCES OF THE UNITED STATES DURING THE PENDENCY OF AN APPEAL OF THE SAME ALLEGATION BEFORE THE BOARD OF VETERANS APPEALS AND THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS CONTRARY TO 38 U.S.C. § 7104; 7252.

A criminal prosecution for wire fraud based on the receipt of payments from the government for disability compensation may not be sought by the Secretary of Veterans affairs prior to the full and final adjudication of the VA claim. The criminal prosecution of a veteran during the pendency of his benefits appeal is premature, in bad faith and contrary to the concept of a non-adversarial, well ordered, claimant friendly scheme of benefits. 38 U.S.C. §§ 301; 303, *Hodge v. West,* 155 F.3d 1356 (Fed. Cir. 1998); *Weaver v. Principi*, 00-2284, March 15, 2001, Unpublished. The Veterans Judicial Review Act of 1988 granted exclusive subject matter jurisdiction to the U.S. Court of Appeals for Veterans Claims for the adjudication of VA claims, 38 U.S.C. § 7252. The Secretary has a clear

and unambiguous duty to follow his own rules and regulations regarding fraud allegations and the proper procedures for forwarding such allegations to the Attorney General for criminal prosecution. If such referral is to be made during the claims appeal process specific regulations must be followed. Accord 38 C.F.R. § 14.561. That was not done here. In this case the pursuit of the criminal conviction of the Appellant was ongoing during the entire pendency of this appeal.

The Secretary appears to have willfully and knowingly circumvented the jurisdiction of this Court and his employees and agents made material misrepresentations of the precedent rulings of this Court and the U.S. Court of Appeals for the Federal Circuit in open court, under oath.

The administrative proceedings below denied the Appellant fundamental fairness and the basic due process protections set forth in 38 C.F.R. §§ 3900-3905.

Had a determination of fraud actually been made, the Appellant would have still had the right to appeal that decision.

The VA procedure for referring a fraud case to the U.S. Department of Justice does not provide for a VA employee testifying before a federal grand jury absent a review by the VA office of General Counsel or Regional Counsel. There was no potential for continuing harm to the agency after they terminated the payment of benefits to the Appellant. There was no exigent circumstance to justify the extraordinary conduct of the Secretary in this case. See *Vitarelli*, supra. The Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it

promulgates. See *Service v Dulles,* 354 U.S. 363, 372 (1957); *Accardi v Shaughnessy,* 347 U.S. 260, 267 (1954). The referral of this case directly from the VA OIG's Chicago office to the U.S. Attorney for the Eastern District of Wisconsin for criminal proceedings is contrary to law, justice, equity and fair play.

CONCLUSION

For the reasons set forth above the Court should order the Secretary to restore to the Appellant his full panoply of V.A. benefits *Nunc Pro Tunc* to the date they were illegally disrupted, November 1, 2004. His daughters should have their educational benefits restored and all collection activity against the Appellant and his family should cease.

When the Court rules to restore the benefits of the Appellant, we shall have arrived at an absurd "*Alice in Wonderland*" result. A veteran will sit in prison for accepting the wire transfer of funds to which he was legally entitled. He will not be entitled to receive the restored benefits because he is now an incarcerated felon!

Mr. Justice Jackson in his dissent in *Federal Crop Insurance Corp. V Merrill et al*, 332 U.S. 380; 68 S.Ct. 1 (1947), could have been writing of this case when he observed "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one way street." *Id.* This extraordinary rendition of a veteran from a VA administrative dispute directly into Federal District Court on criminal charges is unprecedented.

Respectfully,

/s/
ROBERT P. WALSH, Esq.
Counsel for the Appellant

APPENDIX P

UNITED STATES COURT OF APPEALS FOR VETERANS' CLAIMS

No. 05-2425

KEITH ALBERT ROBERTS,	)
	)
Appellant	)
	)
v .	)
	)
JAMES B. PEAKE, M.D., SECRETARY OF VETERANS AFFAIRS,	)
	)
Appellee	)
	)

FIRST AMENDED SUPPLEMENTAL MEMORANDUM OF LAW

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38 C.F.R. § 3.105(d) 10

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38 C.F.R. § 3.957 ..... 7, 10

38 C.F.R. § 14.561 ..... 7, 9

38 C.F.R. § 42.1-42.47 ..... 7, 9

MISCELLANEOUS

After the Madness: A Judge's Own Prison Memoir 292, 1997, SolWachtler, former New York State Chief Judge 15

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The Hunting of the Snark, Lewis Carroll, (1876) .. 6

United States Constitution, 4th Amendment 12

United States Constitution, 5 Amendment 12

United States Constitution, 6 Amendment 12

U.S. Vet. App. R. 27 1

U.S. Vet. App. R. 28 1

U.S. Vet. App. R. 30 (b) 1

3. STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER IN MAKING THE DETERMINATION THAT SEVERANCE OF SERVICE CONNECTION IS WARRANTED, VA MUST CONSIDER ALL ALTERNATIVE BASES FOR ESTABLISHING SERVICE CONNECTION FOR THE CLAIMED DISABILITY THAT ARE RAISED EITHER BY THE CLAIMANT OR BY THE RECORD BEFORE THE AGENCY.

A. Effect of the Response of the Appellant to The Proposed Severance of Service Connected Disability Benefits on the Duty of the Secretary To Consider All Bases for Perfecting Such a Claim, 38 U.S.C. § 7104.

B. What Are the Duties and Obligations of the Secretary and the Officers, Employees and Agents of the U.S. Department of Veterans Affairs Regarding Due Process of Law, Criminal Procedure and Criminal Investigations When the Target Is a Veteran and the Allegations Relate To Claims and Benefits.

II. WHETHER THE SECRETARY IS OBLIGATED UNDER 38 U.S.C. § 5103A TO ASSIST IN DEVELOPING EVIDENCE IN SUPPORT OF ALTERNATIVE BASES FOR COMPENSATION WHICH HAVE BEEN PUT FORWARD BY THE CLAIMANT.

III. WHETHER THE INSTRUCTIONS TO THE VA EXAMINER WHO CONDUCTED THE NOVEMBER 2004 EXAMINATION UPON WHICH THE VA REGIONAL OFFICE AND THE BOARD RELIED TO CONCLUDE THAT MR. ROBERTS DID NOT SUFFER FROM PTSD WERE IMPERMISSIBLY SUGGESTIVE, OR OTHERWISE PREVENTED THE EXAMINER FROM EVALUATING "ALL ACCUMULATED EVIDENCE" AS REQUIRED BY 38 C.F.R. § 3.105(d).

IV. WHAT EFFECT, IF ANY, DID THE DECISION BY MR. ROBERTS TO CANCEL A SCHEDULED VA MEDICAL EXAMINATION (R. AT 1577-80) IN FEBRUARY OF 2005, HAVE ON THE DUTIES OF THE VA TO ASSIST A CLAIMANT OR TO ENSURE THAT THE VA POSSESSES ADEQUATE EVIDENCE TO MAKE A DECISION ON THE CLAIM.

V. WHETHER THE APPELLANT HAS ABANDONED ANY ARGUMENTS MADE IN HIS OPENING BRIEF IN THIS APPEAL.

4. CERTIFICATE OF SERVICE

I, Robert P. Walsh, hereby certify that I have:

1. Mailed the original and 7 copies of the Supplemental Memorandum of Law of the Appellant with certificates of service to the Clerk of this Court by first class U.S. Mail, and,

2. Prior to doing so I have served two copies of the document upon Counsel for the Appellee by mailing them, postage prepaid, addressed as follows:

Ms. Deborah L. Bernal, Esq.
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Department of Veterans Affairs
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_____ 09/09/2008
Robert P. Walsh-Michigan Bar P-42833 Date:
Attorney for Claimant-Appellant
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IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS' CLAIMS

KEITH ALBERT ROBERTS,
Appellant,

v. Vet. App. No. 05-2425

JAMES B. PEAKE, M.D.,
Secretary of Veterans Affairs,
Appellee.

5. SUPPLEMENTAL MEMORANDUM OF LAW

The Appellant, Keith A. Roberts, (hereinafter "Appellant"),pursuant to U.S. Vet. App. *R. 27 and 28*, and the Order of the Court dated July 8, 2008, respectfully submits to the United States Court of Appeals for Veterans Claims ("CAVC" or "Court") his first amended supplemental memorandum of law. The record of appeal is referred to as (R.-) or (Supp. R.-). Documents attached in the appendix as exhibits are referred to as (App. exh. -). The record in *U.S. v. Roberts,* United States District Court for the Eastern District of Wisconsin, docket 05-cr-118, is referred to by the Federal Court PACER document docket number. (PACER -).

The Court ordered a supplemental memorandum of law by an order dated July 8, 2008. The Secretary filed a copy of the opinion of the U.S. Court of Appeals for the Seventh Circuit in 07-1546 under U.S. Vet. App. R. 30 (b). A motion for rehearing and rehearing *en banc* is now pending in that court.

6. ARGUMENT AND AUTHORITIES

I. WHETHER IN MAKING THE DETERMINATION THAT SEVERANCE OF SERVICE CONNECTION IS WARRANTED, VA MUST CONSIDER ALL ALTERNATIVE BASES FOR ESTABLISHING SERVICE CONNECTION FOR THE CLAIMED DISABILITY THAT ARE RAISED EITHER BY THE CLAIMANT OR BY THE RECORD BEFORE THE AGENCY.

Short answer of Appellant: Yes.

38 U.S.C. § 7104. Jurisdiction of the Board

(a) All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

* * *

(c) The Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.

(d) Each decision of the Board shall include–

(1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record; and

(2) an order granting appropriate relief or denying relief.
* * *

It is well settled that the Appellant is entitled to an investigation and consideration by the Secretary of all possible in-service causes of a current disability for which a claim has been filed, including those unknown to the veteran. *Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000).

The Secretary is to advise the veteran that a claim for service connection can be supported by alternative or collateral evidence such as statements from service medical personnel and 'buddy' statements, especially when the service records are not available. *Dixon v. Derwinski*, 3 Vet. App. 261, 263 (1992).

The Appellant was unable to obtain any portion of the official Navy records concerning the February 1969 accident until 1997. His prior statements are consistent with the records now available for review, to include the Navy JAGMAN report and testimony at trial.[1] The Secretary frustrated the efforts of the Appellant and his representatives to obtain the VA IG report.

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[1] Contrary to the impression which may be derived from reading the characterizations of the testimony at trial in *U.S.v. Roberts*, not one witness for the government stated under oath that Mr. Roberts was not present at the February 4, 1969 accident. Several stated they had no recollection. The testimony at trial indicated that there were from 40 to over 100 people present at the scene that day, which was his duty station.

The report of the VA IG was submitted to VARO Milwaukee, on July 8, 2004 and associated with the claims file. (R.-1628-2222). The VARO was in an adversarial posture as they continued the adjudication of the benefits claims and assisted in the criminal case. (R.-1312, 1328, Supp. R. 35, 37). The Appellant and his representative were not given access to the VA IG report until the designation of the record issued in this appeal. (Supp. R.-30, 35).

The VARO and Board had exclusive access to the previously unavailable Navy records, but only drew negative inferences from them, ignoring those portions of the record or witness interviews by the VA IG which did not support their fraud theory. All of the Appellant's testimony and argument relative to his in service hospitalization in the Fall of 1969 and the events of February 4, 1969 at his duty station were ignored. He was present that day. He was not in sick bay, AWOL or on leave. He has been forced to prove that he was not absent by the Secretary. His testimony and documentary evidence have been dismissed out of hand.

A. Effect of the Response of the Appellant to The Proposed Severance of Service Connected Disability Benefits on the Duty of the Secretary To Consider All Bases for Perfecting Such a Claim, 38 U.S.C. § 7104.

Short answer: The Secretary is bound to follow his own regulations and statutes.

The Appellant placed the Secretary on notice of the relevant statutes, regulations and evidence which would have resulted in a continuation of his benefits.

(R. 1299, 1492-98, 2274-83). Page 2 of the critical VA-9 appeal form was omitted from the record in this case. (R. 2372, Supp. R. 1 and 2). Two PTSD stressors are set forth in that document, one, the active duty psychiatric hospital treatment, is not addressed properly by the VA. As John Adams said, facts are stubborn things. See *Rex v. William Wemm and Seven Others*, Super. Ct. of Judicature and Ct. of Assize, Boston, Mass. November, 1770, Reported at X American State Trials 417, 489.

In his reply brief (file stamp revoked) Roberts said the conduct of the VA and VA IG in his case was equivalent to the Star Chamber. The supplemental record on appeal appears to support his position.

There is no requirement in the law that a veteran must specify with precision the statutory provisions or the corresponding regulations under which he is seeking benefits. *Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991).

The Appellant appeared in Washington D.C. by leave of the U.S. Federal District Court and testified at a Board hearing under oath on June 13, 2005. As he was under indictment for a criminal charge arising from the same events that formed the basis for his VA disability claims his testimony implicated his constitutional right of due process. He had raised his concerns in this area to the Secretary in a well reasoned letter dated November 22, 2004. (R. 1492-98). The response to this letter was written by Renee

Szybala[2]. Roberts had raised lack of due process under the 5th Amendment of the U.S. Constitution. (R. 1492).

B. What Are the Duties and Obligations of the Secretary and the Officers, Employees and Agents of the U.S. Department of Veterans Affairs Regarding Due Process of Law, Criminal Procedure and Criminal Investigations When the Target Is a Veteran and the Allegations Relate To Claims and Benefits.

The first contact between the Appellant and the VA Office of the Inspector General (VA IG) was as a complainant. Mr. Roberts believed that documents supporting his earlier effective date claim had been removed from his claims file at the VARO. The VARO director then convinced the VA IG , Mr. Vasil, to investigate Roberts. No probable cause existed. VA employees and officers as high at the Director of Compensation and Pension Service, Renee Szybala, were active in the effort to indict Roberts. (Supp. R. 17, 35, R. 1328-1335, 1529, 1530, 1532, 2283).

""Dick: "First thing we do, let's kill all the lawyers."

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[2] Ms. Szybala is a licensed attorney. While she may not have been serving in that capacity for the agency during her involvement in this case, her professional obligations remained. Ms. Szybala became involved, short stopped the letter to the Secretary, stone walled the American Legion, and directly assisted in the development of the criminal case. Mr. Roberts has called her conduct in this case highly unethical.

Jack Cade: "Nay, that I mean to do.""[3]

William Shakespeare, King Henry the Sixth Part II.

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""We are not persuaded. Lewis Carroll notwithstanding, the fact that the government has "said it thrice" does not make an allegation true. *See* Lewis Carroll, the Hunting of the Snark 3 (1876)("I have said it thrice: What I tell you three times is true.").""

Parhat v. Secretary of Defense, No. 06-1397, _____ F.3d ____ , at 28 (C. A. for the D.C. Cir. June 20, 2008).

The Secretary asserts that after the 2003 amendments under 38 C.F.R. §§ 1.200-1.205 the VA general counsel and regional counsel have no role in VA criminal investigations and referrals. Roberts says that notice and a hearing under 38 C.F.R. § 42.1[4], a probable cause determination, calculation of damages in a benefits case to a sum certain and collections determinations should involve General Counsel prior to being presented to a U.S. Attorney for criminal or civil collections action. See *Weaver v. Principi*, 00-2284,

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[3] *King Henry the Sixth, Part II*, William Shakespeare. While often quoted, almost always out of context. Jack Cade is a rebel and Dick the Butcher a felon as well. Eliminating lawyers may keep them from the gallows, hence their enthus.asm.

[4] The American Legion did requested a hearing under 38 4 C.F.R. § 42.1 *et seq* and review of this matter by C & P Service or the General Counsel. (Supp. R.-18).

Un. Pub. 03/15/01, *Per Curiam*. The Secretary maintains that the word "claims" used in 38 C.F.R. § 14.561 only refers to contract disputes and Federal Tort Claims.

Roberts received a four year sentence contrary to 38 U.S.C. § 6102. Congress limited sentences in VA benefits fraud cases to not more than 1 year of imprisonment. The *ad hoc* manner in which the Board has adjudicated this appeal as a fraud was improper and devoid of due process. The proper procedure under 38 C.F.R. § 42.1 was circumvented. The protections in 38 C.F.R. §§ 3.114 and 3.957 were nullified by the tactics employed in this case.

Ms. Barbara Nehls testified at the Roberts trial. She is now supervising the adjudication of his VA claim. A veteran is entitled to the full panoply of due process protections afforded other citizens, such as a target letter or notice of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The conduct in this case has been contrary to the concept of a non-adversarial, well ordered and claimant friendly *ex-parte* scheme of benefits. *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998). The Secretary has a duty to administer benefits in a fair and equitable manner. 38 U.S.C. §§ 301; 303. VA benefits fraud should be referred to the Federal Bureau of Investigation or the U.S. Treasury for investigation.

II. WHETHER THE SECRETARY IS OBLIGATED UNDER 38 U.S.C. § 5103A TO ASSIST IN DEVELOPING EVIDENCE IN SUPPORT OF ALTERNATIVE BASES FOR COMPENSATION WHICH HAVE BEEN PUT FORWARD BY THE CLAIMANT.

Short answer of Appellant: Yes.

Title 38 U.S.C.§ 5103A, provides in relevant part that the Secretary must:

> "make reasonable efforts to assist in development of a claim unless there is no reasonable possibility that assistance would aid in substantiating the claim"

One of the most troubling aspects of this case is how the Secretary squares his obligation to assist while at the same time conducting the *in camera* fraud investigation of the Chicago office of the VA Inspector General. Mr. Raymond Vasil obtained either the complete Navy JAGMAN report of the February 4, 1969 accident, or major portions of it.[5] The Secretary refused to allow Mr. Roberts to have a copy of the Vasil report, or to even review it. He was not permitted to review the report at his BVA hearing in Washington, D.C., on June 13, 2005. The first opportunity for the Appellant to the VA records relevant to his claims did not occur until the designation of the record was issued in this appeal, December 28, 2005.

The JAGMAN report had been sought by Mr. Roberts and was highly relevant to his claims. He was entitled to a copy of it, and the IG report in his claims file. The documents allegedly form the basis for the rating decisions dated August 16, 2004 and January 20, 2005. (R. 1303, 1328, 1542). Roberts says that prior

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[5] The report prepared for the VA IG by Mr. Vasil was not admitted into evidence in the District Court due to a hearsay objection. The Vasil report is made up of portions of the JAGMAN report.

to his indictment he should have been afforded the due process called for by 38 C.F.R. § 14.561 and 38 C.F.R. §§ 42.1-42.47. The Secretary is prohibited from creating two classes of litigants. The procedural safeguards provided litigants under 38 C.F.R. § § 42.1-42.47 must also be afforded to veterans that may later be subjected to criminal prosecution and deprivation of liberty and property. See *Vitarelli v. Seaton,* 359 U.S. 535 (1959). A plain reading of the regulation is reasonable. See *Splane v. West*, 216 F.3d 1058 (Fed. Cir. 2000); *Roper v. Nicholson,* 20 Vet. App. 173 (2006). Roberts should have had a hearing before a neutral Title 5 Administrative Law Judge, with formal written notice of the allegations against him and an opportunity to review the supporting evidence.

III. WHETHER THE INSTRUCTIONS TO THE VA EXAMINER WHO CONDUCTED THE NOVEMBER 2004 EXAMINATION UPON WHICH THE VA REGIONAL OFFICE AND THE BOARD RELIED TO CONCLUDE THAT MR. ROBERTS DID NOT SUFFER FROM PTSD WERE IMPERMISSIBLY SUGGESTIVE, OR OTHERWISE PREVENTED THE EXAMINER FROM EVALUATING "ALL ACCUMULATED EVIDENCE" AS REQUIRED BY 38 C.F.R. § 3.105(d).

Short answer of Appellant: Yes.

38 C.F.R. § 3.105 (d) Revision of decisions, relates to severance.

* * *

"(d) Severance of service connection. Subject to the limitations contained in §§ 3.114 and 3.957,

service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government). * * * A change in diagnosis may be accepted as a basis for severance action if the examining physician or physicians or other proper medical authority certifies that, in the light of all accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous. This certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion. When severance of service connection is considered warranted, a rating proposing severance will be prepared setting forth all material facts and reasons. The claimant will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor and will be given 60 days for the presentation of additional evidence to show that service connection should be maintained. * * *
(Authority: 38 U.S.C. 5112 (b)(6))"

The rating decision of August 16, 2004 (R. 1328-1332) is simply a restatement of conclusions obtained from the VA IG and a VA medical examination given for the express purpose of revoking benefits. That it is 5 pages long and summarizes almost 3,000 pages of record is significant. The BVA decision builds on this approach, repeating hearsay statements and conclusions and giving them the force and effect of sworn testimony.

The suggestive and inflammatory language of the examination request of October 5, 2004, (R. 1365-

1375/1481-1491), was so adversarial that in completely tainted the subsequent report dated November 5, 2004, by Dr. Berger. The examination request states . . "The following facts are established by the evidence of record and should be considered by the opining psychiatrist: . . 3. The diagnosis of PTSD is not acceptable for VA rating purposes as it is based on a stressor determined to be fraudulent." (R. 1366). Included as an attachment was a progress note of April 7, 2003, in which there was a disturbance involving Mr. Roberts at the VAMC in Madision, Wisconsin. (R. 1377-1379).

The Berger report (R. 1500-1503) covers a record of over 2,000 pages spread over more than 30 years and is based on a records review only. It quotes only VA sources, does not analyze or discuss any of the favorable medical opinions of other healthcare professionals and is another conclusion devoid of analysis or objectivity. The reports of Dr. Derozier, (R. 1225-1231), are not addressed. There were a number of favorable medical reports at the time which Berger overlooks.

A federal trial competency examination resulted in an opinion that Roberts suffered from PTSD. After taking a history and reviewing the VA and military records the non-VA federal examiner wrote that the onset of the PTSD appeared to be related to in-service events.

See *Moore v. Nicholson*, 21 Vet. App. 211 (2007), ". . it is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history, reconciling the various reports

into a consistent picture so that the current rating may accurately reflect the elements of disability present."

IV. WHAT EFFECT, IF ANY, DID THE DECISION BY MR. ROBERTS TO CANCEL A SCHEDULED VA MEDICAL EXAMINATION (R. AT 1577-80) IN FEBRUARY OF 2005, HAVE ON THE DUTIES OF THE VA TO ASSIST A CLAIMANT OR TO ENSURE THAT THE VA POSSESSES ADEQUATE EVIDENCE TO MAKE A DECISION ON THE CLAIM.

Short answer of Appellant: No adverse impact to the Appellant and no prejudice to the Appellee, there was good cause for the failure of the Appellant to report.

The decision not to appear for an additional medical examination by the Appellant was reasonable in view of the highly charged and adversarial atmosphere he had encountered at VA facilities after the allegations of fraud against him. The examination appears to have been scheduled for the improper purpose of bolstering the criminal prosecution against the veteran. See the letter from Philip R. Wilkerson of the American Legion to VARO Milwaukee dated December 13, 2004. (R. 1537). This case is factually distinguished from *Wood v. Derwinski*, 1 Vet. App. 406 (1991); and *Olsen v. Principi*, 3 Vet. App. 480 (1992). Disability hearings and implicitly C & P examinations are *ex parte* and non-adversarial. See *Manio v. Derwinski*, 1 Vet. App. 140, 144 (1991); see also *Forshey v. Principi*, 284 F.3d 1335, 1355 (Fed. Cir.), *cert. denied*, 123 S. Ct. 110 (2002). The VA is not authorized to develop evidence for the purpose of challenging the claimant, but rather is required to

"assist a claimant in developing the facts pertinent to [his or her] claim." 38 C.F.R. § 3.103(a).

There were "wanted posters" at the VARO security desk and posted at locations around the VA medical center. Roberts had been the subject of a campaign of leaks, innuendo and accusations by the VARO and VA IG staff but had not seen any of the evidence against him. See the letters and email traffic dated prior to February, 2005, involving benefits and VA IG personnel. (Supp. R. 10, 12, 14, 17, 30, 32, 35, 37). Roberts is mentally and physically ill and his condition had not improved or changed. The VA had no plausible reason to believe it had. See *Kowalski v. Nicholson*, 19 Vet. App. 171 (2005). The rights of the Appellant under the 4 , 5 and 6 Amendments to the U.S. Constitution th th th would have been compromised by another VA examination at the time. The decision in the claim had already been made. (R. 1542). After providing the examining physicians the VA IG report and warning them of how volatile he is in the C & P instruction dated February 8, 2005 (R. 1582), any hope of fundamental fairness or objectivity had been destroyed. Kowalski, *Id.*

V. WHETHER THE APPELLANT HAS ABANDONED ANY ARGUMENTS MADE IN HIS OPENING BRIEF IN THIS APPEAL.

Short answer of Appellant: No, the Appellant stands by the opening brief which is incorporated by reference.

The dispute between Mr. Roberts and Ms. Cote' did not involve the content of her brief, but her reluctance to inform the Court of the criminal proceedings

commenced during this appeal. Mr. Roberts urged Ms. Cote' to file a motion and seek intervention in the form of a stay of the criminal proceedings based on the exclusive jurisdiction over appeals concerning veterans benefits of this Court. The criminal prosecution and the restoration of his benefits are inextricably intertwined. Roberts is now incarcerated for accepting VA payments. Only this Court may make a final determine regarding VA benefits. Whether Roberts absented himself from his duty station at Naples, Italy, on February 4, 1969, was a matter for the U.S. Navy to determine (R. 75, 2274).

The United States Court of Appeals for the Seventh Circuit states that "The district court did not "review" the decision of the Board of Veterans' Appeals regarding his disability rating or entitlement to benefits; instead, it simply judged whether Mr. Roberts had committed a federal crime in the process of obtaining these benefits." *U.S. v. Roberts*, No. 07-1546,_____ F.3d ____ (7th Cir. July 7, 2008), opinion at 12, 13.

CONCLUSION

The Court should order the Secretary to restore to the Appellant his full panoply of V.A. benefits *Nunc Pro Tunc* to November 1, 2004. His daughters should have their educational benefits restored and all collection activity against the Appellant and his family should cease. Roberts will still languish in prison, but will have some vindication. The Secretary has abused his authority by seeking the premature criminal indictment of Roberts. He circumvented the jurisdiction of this Court and the Constitutionally protected liberties of the Appellant. The extraordinary

rendition of Mr. Roberts from a VA claims dispute directly to a criminal prosecution requires review of the VA policies, procedures and regulations in place for fraud cases, including the duties and obligations of VA employees when alleging fraud of either an administrative or criminal nature. As judge Sol Wachtler once observed, "the government can indict a ham sandwich."

Respectfully,

ROBERT P. WALSH, Esq.
Counsel for the Appellant

APPENDIX Q

[Seal Department of Justice]

U.S. Department of Justice

United States Attorney's Office
Eastern District of Wisconsin
Green Bay Division

205 Doty Street, Suite 301
Green Bay, WI 54301
920/884-1066

March 5, 2007

NEWS SUMMARY:

Oconto County Resident Sentenced to Prison for False Claims of Post Traumatic Stress Disorder and Defrauding the Department of Veterans Affairs (VA) of over $350,000

United States Attorney Steven M. Biskupic announced today that Keith A. Roberts (DOB: 4/13/48) of Gillett, Wisconsin, was sentenced on March 2, 2007, to 48 months in federal prison by United States District Judge William C. Griesbach. Roberts was convicted during a three-day jury trial in November 2006, on five counts of wire fraud, stemming from false claims that Robert made VA benefits from 1994 to 2004. Those false claims caused Roberts to fraudulently obtain over $355,000 in VA benefits.

Roberts was an airman stationed at the Naval Air Facility in Naples, Italy, in 1969. The indictment alleged, and the government proved at trial, that Roberts fabricated his role in the attempted rescue of an airman who was killed at the Naval Air Facility on February 4, 1969. Roberts also fabricated his relationship with that airman. Roberts was discharged from active duty in 1971. Over 25 years later, in December 1994, Roberts falsely claimed to the VA that the airman's death in 1969 caused Roberts to suffer from post-traumatic stress disorder (PTSD). Based on that false claim, the VA granted Roberts' benefits claim retroactive to 1992. The VA began making monthly payments to Roberts' bank account; between direct payments to Roberts and education benefits for his children, Roberts was paid over $355,000 in VA benefits to which he was not entitled based on his fraudulent claims.

Following the conviction, John W. Brooks, the Special Agent-in-Charge at the VA's Office of the Inspector General (OIG) in Chicago, commented: "We are always mindful of, and thankful for, the many great sacrifices by the men and women of the military, both past and present, especially whenever our nation celebrates Veterans Day. The VA Office of Inspector General is mindful that fraudulent claims which take money from deserving veterans cannot be tolerated. While unfortunate that this trial was necessary, the jury in this case correctly asserted that such fraudulent claims will not be tolerated."

The case was investigated by Special Agents Ray Vasil and Joe Cossairt of the VAOIG in Chicago. The case was prosecuted by Assistant United States

Attorney Timothy Funnell, U.S. Attorney's Office for the Eastern District of Wisconsin, Green Bay Division.

# # #

For more information contact:

Assistant United States Attorney Timothy Funnell (920/884-1068) or First Assistant United States Attorney Michelle L. Jacobs (414-297-1700)

APPENDIX R

4 February 1969

Statement of Max E. JOHNSON, AMHI 389 27 36, USN, assigned to the Operational Maintenance Airframes Shop of the U.S. Naval Air Facility Naples, Italy. I did observe the following on 4 February 1969.

On the morning of January 23 it was determined by the Maintenance Chief (Floyd N. MORRIS, ADRC, 373 07 13, USN) and my Shop Chief, William W. STEWART, AMSC, 373 89 20, USN, that the nose strut needed to be changed on COMTDEASTFOR C54 BUNO 50878.

Chief STEWART, Gary D. HOLLAND, AMSAN, B33 52 91, USN and I were involved in pulling the strut. On Saturday 1 February 69 HOLLAND and I started to install the new strut. We were minus one bolt, but we found a temporary replacement, that would enable us to take the aircraft off jacks, so that in the event of fire the aircraft could be moved. Chief STEWART was here during this time and the aircraft was considered safe to drop off jacks. The jacks were removed and the station CDO (LCDR Raymond H. BISBING 640402/6602 USN) notified.

Monday 3, February, HOLLAND and myself started putting the rigging (nose steering etc.) back. Tuesday 4 February 1969, HOLLAND was taking the PO3 exam in the morning and did not return to work until 1200. I went to chow at 1100 and returned at 1200.

There were just a few items left that we could do until the three (3) bolts came in that we were AOCP for, one stbd support strut bolt and both nose wheel steering cylinder bolts.

At a few minutes after 1200 I assigned HOLLAND the job of 1. Tightening the clamps that hold the nose steering hydraulic lines rigid to the strut. 2. Tightening the two (2) bolts that hold the down-micro-switch and just started the rmts on the bolts, at this time (about 1000 hrs) I noted that the safety pin was installed. After I had assigned HOLLAND this work, I walked into the Airframes Shop and was having a smoke when the nose gear collapsed.

I have read the above statement, consisting of this (1) page and it is true to the best of my knowledge and belief.

/s/
Max E. Johnson

Witnessed:

/s/
Jerry L. FUCHS, LCDR, USN

ENCLOSURE 14